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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 318.

HENRY J. ROGERS, PLAINTIFF IN ERROR,

vs.

WILLIAM F. DURANT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 23, 1888.

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INDEX.

	Original.	Print.
Caption	1	1
Præcipe for summons	2	1
Bond for costs	3	2
Summons issued, not served	4	2
Declaration	5	2
Copy of instrument and account sued on	9	4
Alias summons issued, not served	16	9
Pluries summons issued, not served	16	9
Pluries summons	17	9
Marshal's return	18	9
Pleas	19	10
Similiter replication and demurrer to pleas	42	19
Similiter	44	20
Order overruling demurrer to certain pleas, &c.	45	21
Order granting leave to amend declaration, &c.	45	21
Special counts to declaration	46	21
Stipulation to file special counts	82	37
Replications to eighth plea	83	37
Demurrer to replications	89	39
Demurrer to replications	92	40
Replications to eighth plea	94	41

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 15, 1890.

	Original.	Print.
Order on demurrers, &c.	99	43
Order on plaintiff to reply	100	44
Rejoinder	101	44
Judgment	102	44
Bond	104	45
Clerk's certificate	106	46
Writ of error	107	46
Citation	108	47
Proof of service of citation	109	48
Assignment of errors	110	48

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, judge of the circuit court of the United States for the seventh judicial circuit, and the Hon. Henry W. Blodgett, judge of the district court of the United States for said northern district of Illinois, on Wednesday, the thirtieth day of June, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

HENRY J. ROGERS *vs.* WILLIAM F. DURANT, Impleaded with JAMES W. DAVIS *et al.*	Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-sixth day of January, 1884, came the plaintiff, by his attorney, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his præcipe for a writ of
2 summons and a bond for costs in said entitled cause; which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

Circuit Court of the United States within and for the Northern District of Illinois.

HENRY J. ROGERS *vs.* JAMES W. DAVIS, MORDECAI B. SPRAGUE, William Ruth, Timothy P. Richards, James H. Gesner, William F. Durant, and Henry C. Crane, Trustee of Wilhelmina Davis Train, Surviving Partners of the Late Firm of James W. Davis & Associates.	Action of Assumpsit. Damages, thirty thousand dollars.

The clerk of said court will please issue a summons in said cause, directed to the marshal of said district to execute, returnable to next term in course.

HENRY C. WHITNEY,
Attorney for Plaintiff.

Chicago, December 20th, 1883.

Endorsed: Filed Jan'y 26, 1884. W. H. Bradley, clerk.

3 *Bond for Costs.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

ROGERS
vs. } In Assumpsit.
DAVIS *et al.*

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 26th day of January, A. D. 1884.

H. C. WHITNEY.

Endorsed: Filed Jan'y 26, A. D. 1884. W. H. Bradley, clerk.

4 On the same day, to wit, on the twenty-sixth day of January, 1884, there issued out of said clerk's office a writ of summons in said entitled cause; which said writ was returned by the marshal not served.

Afterwards, to wit, on the 24th day of March, 1884, came the plaintiff, by his attorney, and filed in said clerk's office his declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

5 In the Circuit Court of the United States for the Northern District of Illinois. May Term, A. D. 1884.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Henry J. Rogers, who is a citizen of the State of Wisconsin, plaintiff in this suit, complains of James W. Davis and Mordecai B. Sprague, who are citizens of the State of Minnesota; William Ruth, who is a citizen of Colorado; William F. Durant, who is a citizen of Illinois; Henry C. Crane, trustee for Wilhelmina Davis Train, who is a citizen of New York, and Timothy P. Richards, who is a citizen of some other State than Wisconsin, but which State is unknown to plaintiff, said defendants being surviving partners of the late firm of James W. Davis and Associates, defendants in this suit, summoned, etc., of a plea of trespass on the case on promises:

For that whereas the said defendants, as surviving partners of the late firm of James W. Davis and Associates, heretofore, to wit, on the first, 1st, day of January, in the year of our Lord one thousand eight hundred and eighty-four, at Cheyenne, to wit, at the district aforesaid, became and were indebted to the said plaintiff in the sum of thirty thousand ($30,000) dollars, of lawful money of the United States of America, for divers goods, wares, and merchandise by the

said plaintiff before that time sold and delivered to the said
6 defendants and at the special instance and request of the said defendants; and, being so indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same year and day and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise, at the time of the sale and delivery thereof, were reasonably worth, when the said defendants should be thereunto afterwards requested; and the said plaintiff aver- that the said goods, wares, and merchandise last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further sum of thirty thousand ($30,000) dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the
7 said defendants afterwards, on the same day and year and at the place aforesaid, had notice.

And whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, became and were indebted to the said plaintiff in the further sum of thirty thousand (30,000) dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendants and at the like request of the said defendants: and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants and at the like request of the said defendants; and in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiff; and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff; and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendants and at the like special request of the said defendants; and, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully
8 promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the same day and year and at the place aforesaid, accounted together

with the said plaintiff of and concerning divers others sums of money before that time due and owing from the said defendants to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of thirty thousand (30,000) dollars of like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested.

Nevertheless, the said defendants (although often requested, etc.) have not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plain-
9 tiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto altogether refused and still do refuse, to the damage of the said plaintiff of thirty thousand (30,000) dollars; and therefore the said plaintiff bring- suit, etc.

HENRY C. WHITNEY,
Plaintiff's Attorney.

Copy of Instrument and Account Sued on.

James W. Davis, Mordecai B. Sprague, Timothy P. Richards, William Ruth, William F. Durant, and Henry C. Crane, trustee of Wilhelmina Davis Train, surviving partners of James W. Davis and associates, to Henry J. Rogers.

To goods, wares, & merchandise sold & delivered	$30,000
To money lent and advanced	30,000
To money paid, laid out, and expended	30,000
To money due for interest & forbearance	30,000
To labor, services, and material	30,000
To balance due on account stated	30,000
To money had & received to & for the use of the plaintiff	30,000
To amount due on 20 several pieces of commercial paper made or accepted by you and belonging to me and lost or mislaid	30,000

10 The within and foregoing declaration is based upon twenty several pieces of commercial paper, all of which were sold, assigned, and transferred to the plaintiff, for value, in the regular course of business, and while in his ownership and possession were lost and he has no literal copy thereof, but the following are substantial copies:

1.

CHEYENNE, *April* 12, 1869.

At sight pay Charles McDonald or order nine hundred & forty-five $\frac{99}{100}$ dollars, value received, and charge to account of—

CHARLES A. HENRY.

To James W. Davis & Associates, Cheyenne, Dakota.

[Written across the face in red ink:] Accepted. James W. Davis & Associates, per C. Christopher, cashier.

2.

CHEYENNE, *April* 13, 1869.

At sight pay to the order of Rogers & Co. or order two hundred dollars, value received, and charge to account of—

JOHN W. McINTYRE.

To James W. Davis & Associates, Cheyenne, Dakota.

[Written across the face in red ink:] Accepted. J. W. Davis & Ass'tes, per C. Christopher, cashier.

3.

CHEYENNE, *May* 18, 1869.

Rogers & Co., Cheyenne:

Pay to the order of F. Haggerty three hundred & eighty-eight $\frac{45}{100}$ dollars.

J. W. DAVIS & ASSOCIATES,
Per C. CHRISTOPHER, *Cashier*.

11

4.

CHEYENNE, *May* 17, 1869.

Rogers & Co., Cheyenne:

Pay to the order of T. C. Bush ninety-nine $\frac{35}{100}$ dollars.

J. W. DAVIS & ASSOCIATES,
Per CHRISTOPHER, *Cashier*.

5.

CHEYENNE, *May* 24, 1869.

Sixty days after date pay to the order of John H. Young & Co. twenty-two thousand seven hundred and thirty-eight $\frac{79}{100}$ dollars and charge to the account of—

JAMES W. DAVIS & ASSOCIATES,
Per C. CHRISTOPHER, *Cashier*.

To Rogers & Co., Cheyenne, Dak.

Endorsed as follows: Cr. by payment on the within $12,738.79.

6.

CHEYENNE, *May 28th*, 1869.

Sixty days after date pay to the order of H. Robinson one hundred & fifty-seven $\frac{5}{100}$ dollars, value received, & charge to account of—

JAMES W. DAVIS & ASSOCIATES,
Per C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

7.

CHEYENNE, *May* 28, 1869.

Sixty days after date pay to the order of Wyatt & Jones one thousand & thirty-eight $\frac{62}{100}$ dollars, value received, & charge account of—

JAMES W. DAVIS & ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

12 8.

CHEYENNE, *May* 31, 1869.

Pay to the order of A. H. Hayett seventy-one $\frac{69}{100}$ dollars, value received, and charge to ac. of—

JAMES W. DAVIS & ASSOCIATES,
$71.69. P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne.

9.

CHEYENNE, *June 2d*, 1869.

Sixty days after date pay to the order of H. J. Rogers & Co. two hundred and thirty-two $\frac{82}{100}$ dollars, value received, and charge to account of—

HANES & RUTH.

To James W. Davis & Associates, Cheyenne, Dakota.

[Written across the face in red ink:] Accepted. J. W. Davis & Associates, p'r C. Christopher, cashier.

10.

CHEYENNE, *June 2nd*, 1869.

Sixty days after date pay to the order of James McQuillan three hundred & fourteen $\frac{13}{100}$ dollars for value received.

JAMES W. DAVIS & ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

11.

CHEYENNE, *June 2nd*, 1869.

Sixty days after date pay to the order of M. V. Lee one hundred & twenty-eight $\frac{55}{100}$ dollars, value received, & charge to account of—

JAMES W. DAVIS & ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

13

12.

CHEYENNE, *June* 2, 1869.

Sixty days after date pay to the order of James Crawford three hundred dollars, value received, & charge to account of—

JAMES W. DAVIS & ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

13.

CHEYENNE, *June 2nd*, 1869.

Sixty days after date pay to the order of Thomas B. Biggers two hundred & ninety-five $\frac{6}{100}$ dollars, value received, & charge to account of—

JAMES W. DAVIS & ASSOCIATES,
Per CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dakota.

14.

CHEYENNE, *June 2d*, 1869.

Sixty days after date pay to the order of John M. Mansfield one hundred & eighty-nine $\frac{80}{100}$ dollars, value received, & charge to account of—

JAMES W. DAVIS AND ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

15.

CHEYENNE, *June 3rd*, 1869.

Sixty days after date pay to the order of Samuel Hance one hundred dollars, value received, & charge to account of—

JAMES W. DAVIS & ASSOCIATES,
Per C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

14 16.

CHEYENNE, *June* 4, 1869.

At sight pay to the order of J. M. Mansfield six hundred and thirty-eight $\frac{95}{100}$ dollars, value received, and charge to account of—

J. W. DAVIS & ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

17.

Sixty days after date pay to the order of H. J. Rogers & Co. three thousand & eighty-four $\frac{52}{100}$ dollars, value received, and charge to account of—

JAMES W. DAVIS & ASSOCIATES,
P'r C. CHRISTOPHER, *Cashier.*

To Rogers & Co., Cheyenne, Dak.

Endorsed: August 21, 1869. Paid hereon $2,500.00.

18.

OMAHA, *Nov.* 1*st*, 1869.

Thirty days after date pay to the order of myself two thousand one hundred and eighty-eight $\frac{54}{100}$ dollars, value received, & charge to account of—

R. S. VAN TOSSELL.

To James W. Davis & Associates, Cheyenne, Wyoming.

15 (19.)

CHEYENNE, *December* 5, 1869.

At sight pay to the order of Rogers & Co. two hundred and fifty dollars, value received, and charge to account of—

W. W. CORLETT.

To J. W. Davis & Associates, Cheyenne, Wyoming.

[Written across the face:] Accepted. J. W. Davis & Assoc's, per C. Christopher, cashier.

(20.)

CHEYENNE, *February* 21*st*, 1870.

At sight pay to the order of Rogers & Co. three hundred dollars, value received, and charge to account of—

SAMUEL K. DAY.

To J. W. Davis & Associates, Cheyenne, Wyoming.

[Written across the face:] Accepted. J. W. Davis & Assoc's, per C. Christopher.

Endorsed: Filed this 24th day of March, 1884. Wm. H. Bradley, clerk.

16 On the same day, to wit, on the twenty-fourth day of March, 1884, there issued out of said clerk's office an *alias* writ of summons in said entitled cause; which said writ was returned by the marshal not served.

Afterwards, to wit, on the seventh day of July, 1884, there issued out of said clerk's office a *pluries* writ of summons in said entitled cause; which said writ was returned by the marshal not served.

Afterwards, to wit, on the twenty-seventh day of October, 1884, there issued out of said clerk's office a *pluries* writ of summons in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

17 *Pluries Summons.*

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you again to summon William F. Durant, impleaded with James W. Davis *et al.*, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the third Monday of December next, to answer unto Henry J. Rogers of a plea of trespass on the case upon promises, to his damage, as it is alleged, of thirty thousand dollars; and have you then and there this writ.

[SEAL.] Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 27th day of October, in the year of our Lord one thousand eight hundred and eighty-four and of our Independence the 109th year.

18 WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have served the within summons by reading the same to and in the presence and hearing of the within-named William F. Durant this 27th day of October, 1884.

A. M. JONES,
U. S. Marshal.
R. D. SHERMAN.

Endorsed: Filed Oct. 30, A. D. 1884. Wm. H. Bradley, clerk.

19 Afterwards, to wit, on the twentieth day of April, 1885, came William F. Durant, by his attorneys, and filed in said clerk's office his pleas in said entitled cause; which said pleas are in the words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA, }
Northern District of Ills. }

In the Circuit Court Thereof. December Term, A. D. 1884.

HENRY J. ROGERS
vs.
JAMES W. DAVIS, WILLIAM F. DURANT, *et al.* } Assumpsit.

William F. Durant, impleaded, &c.

Now comes the said defendant, by Campbell and Lawrence, his attorneys, and defends the wrong and injury, when, &c., and says *actio non*, and because he says that he did not make the said several promises and undertaking- in plaintiff's declaration and the several counts thereof mentioned, nor any nor either of them, in manner and form as said plaintiff hath above thereof declared against him; and of this the defendant puts himself upon the country.

W. F. DURANT.

20 STATE OF ILLINOIS, }
County of Cook. }

William F. Durant, being first duly sworn, states on oath that he is a defendant in the foregoing cause, and that the foregoing plea which is signed by him is true in substance and in fact.

W. F. DURANT.

Subscribed and sworn to before me this 22nd day of December, A. D. 1884.

[SEAL.] THOS. B. MARSTON,
Notary Public.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

2. In the Circuit Court Thereof. December Term, A. D. 1884.

HENRY J. ROGERS
vs.
JAMES W. DAVIS, WILLIAM F. DURANT, *et al.* } Assumpsit.

And for a further plea in this behalf defendant says *actio non*, &c., because he says that he is not nor ever was a partner of or jointly liable with that said James W. Davis, Mordecai B. Sprague, James H. Gessner, Pierson S. Mattox, William Ruth, Henry C.
21 Crane, as trustee for Wilhelmina Davis Train, and Timothy P. Richards in respect of the several supposed causes of action

in said declaration or either or any of the counts thereof mentioned, in manner and form as the plaintiff hath above in that behalf alleged.

And of this he, the said William F. Durant, puts himself upon the country.

W. F. DURANT.

STATE OF ILLINOIS, } ss:
County of Cook, }

William F. Durant, being first duly sworn, states on oath that the above plea signed by him is true in substance and in fact.

W. F. DURANT.

Subscribed and sworn to before me this 15 day of December, A. D. 1884.

[SEAL.] ROSWELL B. BACON,
Notary Public.

3. And for a further plea in this behalf to the said plaintiff's declaration and each of the counts thereof that said defendant, William F. Durant, says *actio non*, &c., because he says that the said several supposed causes of action in said plaintiff's declaration mentioned did not nor did any or either of them accrue to the plaintiff at any time within five years before the commencement of
22 this suit, in manner and form as the said plaintiff hath above complained against him, the said defendant; and this he is ready to verify.

Wherefore he prays judgment, &c.

4. And for a further plea in this behalf to said plaintiff's declaration and each of the counts thereof the said defendant, William F. Durant, says *actio non*, &c., because he says that the said several supposed causes of action and each and all of them in said plaintiff's declaration and each of the several counts thereof mentioned are founded upon bills of exchange, and that no cause of action has accrued upon any or either of said bills of exchange to the said plaintiff or the holder thereof within five years next before the bringing of this suit, as the plaintiff hath above complained against him, the said defendant, but that each and all of said supposed causes of action accrued, if at all, after the tenth day of February, A. D. 1849, and prior to the fourth day of April, A. D. 1872; and this he is ready to verify.

Wherefore he prays judgment, &c.

5. And for a further plea in this behalf to said plaintiff's declaration and to each of the counts thereof defendant says *actio non*, &c., because he says that each and all of the supposed causes of
23 action in said plaintiff's declaration and each of the counts thereof mentioned are founded upon contracts of indebtedness executed, rendered, entered into, or accrued beyond the limits of the State of Illinois, and that the several supposed causes of action in said declaration and each or either of the counts thereof mentioned did not nor did either of them accrue to said plaintiff at

any time within five years next before the commencement of this suit, in manner and form as the said plaintiff hath above complained against him, the said defendant, but that each of said several supposed causes of action accrued, if at all, after the tenth day of February, A. D. 1849, and prior to the fourth day of April, A. D. 1872, and this he is ready to verify. Wherefore he prays judgment, &c.

6. And for a further plea in this behalf this defendant says *actio non*; &c., because he says after the making of the several promises in said declaration mentioned and before the commencement of this suit that said firm of Jas. W. Davis & Associates, to wit, on the days when said demands respectively became due, paid to said plaintiff and the plaintiff accepted from said firm of Jas. W. Davis and Associates divers moneys, amounting to a large sum, to wit, the amount of all the sums of money in said declaration mentioned, in full
24 satisfaction and discharge of all the sums of money last aforesaid; and this the said defendant is ready to verify. Wherefore he prays judgment, &c.

7. And for a further plea in this behalf this defendant says *actio non*, &c., because he says that heretofore on, to wit, the third of April, 1869, drafts for a large sum of money, to wit, the sum of $125,000.00, was deposited with said plaintiff to be collected for the account of said firm of Jas. W. Davis & Associates, and that it was then and there agreed that said plaintiff should pay drafts and acceptances of said Jas. W. Davis & Associates then outstanding or which should be thereafter made to an amount equal to the sum of the drafts deposited with plaintiff for collection for account of said Jas. W. Davis & Associates; and defendant avers that each and all of the said supposed promises and undertakings in plaintiff's declaration mentioned are founded upon drafts or acceptances of said Jas. W. Davis & Associates, which it was agreed between them and said plaintiff should be paid by said Rogers as aforesaid; and defendant further avers that said drafts so deposited with said plaintiff to be collected by him as aforesaid were respectively paid to said plaintiff at maturity. Wherefore defendant avers that each and all of
25 said sums of money alleged in said declaration to be due said plaintiff from said Jas. W. Davis & Associates have been fully paid to said plaintiff.

And this the defendant is ready to verify. Wherefore he prays judgment, &c.

8. And for a further plea in this behalf the said defendant, William F. Durant, says that the said plaintiff ought not to have or maintain his aforesaid action against him, because he says that prior to the 24th day of September, A. D. 1870, and on, to wit, the 3rd day of December, A. D. 1867, the said defendants in this suit entered into a certain contract by which they agreed to furnish one million ties and two hundred thousand feet of lumber to the trustees for the building of the Union Pacific railroad, which contract is called the million-tie contract in the decision of the supreme court of the city, county, and State of New York herein set forth; that the business of performing said contract was fully carried out by said defendants under the name and style of Davis, Sprague and

Co.; that said contract was fully performed by the said defendants long before September 26th, A. D. 1870, to wit, on the 20th day of November, A. D. 1868; that afterwards a certain copartnership or association, of which the said defendants, Davis and Gessner,
26 were partners or associates, was formed under the name and style of Jas. W. Davis and Associates, for the business of furnishing ties and lumber to the trustees for the building of the Union Pacific railroad outside of the ties and lumber to be delivered by the said Davis, Sprague and Co. and to be delivered in a wholly different place, and that the business of the said Jas. W. Davis and Associates was wholly and entirely distinct from that of the said Davis, Sprague and Co., and that this defendant was not a partner nor in any way connected with or interested in the business of said Jas. W. Davis and Associates.

That afterwards, on September 26th, A. D. 1870, this defendant and defendants M. B. Sprague and P. S. Mattox commenced a suit in the supreme court of the city, county, and State of New York, which was and is a court of general jurisdiction, against Timothy P. Richards, James W. Davis, James H. Gessner, William Ruth, Henry C. Crane, as trustee of Wilhemina Davis Train, composing with said Durant. Sprague, and Mattox the firm of Davis, Sprague and Co.; James W. Davis and James H. Gessner, as copartners, composing the firm of Jas. W. Davis and Associates; Oliver Ames and others, trustees, and Elizabeth Davis, wife of James W. Davis,
27 for the purpose of procuring an adjustment and settlement of the accounts between the firm of Davis, Sprague and Co. and the firm of Jas. W. Davis and Associates; that said suit was a proceeding in equity, and that in said suit, among other things, complainants alleged that Davis was wrongfully converting the funds belonging to Davis, Sprague and Co. to the use of the firm of Jas. W. Davis and Associates; that Davis was charged to be insolvent. A dissolution of the firm of Davis, Sprague and Co. was asked for and a statement of the affairs of the said firm and the money due from the trustees of the Union Pacific railroad to Jas. W. Davis and Associates might be paid to Davis, Sprague and Co. in liquidation of the claims of Davis, Sprague and Co. against said Davis, Gessner and associates and for an adjudication of all questions of liability of this defendant and of the other members of the firm of Davis, Sprague and Co. in reference to the firm of Jas. W. Davis and Associates or its creditors.

That afterwards, to wit, on the 22nd day of October, A. D. 1870, said cause was, under the law and practice of the said supreme court, referred to A. A. Redfield, as sole referee, to hear and deter-
28 mine the same, and also to take and state an account of all claims justly chargeable upon the fund in question in said cause, as well in favor of any and all of the parties thereto, as also in favor of creditors of the respective copartnerships named in the pleadings in said cause.

And afterwards, to wit, on the 28th day of December, 1870, one Francis M. Bixby was appointed receiver of the firm of Davis,

Sprague and Co. and of Jas. W. Davis and Associates, with the usual powers.

That the trustees of the Union Pacific railroad paid a large sum of money to the said receiver in settlement of the claims against them of the firm of Davis, Sprague and Co. and of claims against them of Jas. W. Davis and Associates, and it became and was necessary in said suit for the purpose of determining the proper distribution of the funds so paid to the receiver to determine what persons were liable to the creditors of Davis, Sprague and Co. and what persons were liable to the creditors of the firm of Jas. W. Davis and Associates, so that the assets might be marshalled; and afterwards, to wit, on the 11th day of November, 1870, an order was entered in said cause of the said supreme court that all persons, partners and copartners, having claims against the firms of Davis, Sprague & Co. and Jas. W. Davis and Associates, or either or both of said firms, present
the same, together with their proofs in support of the validity
29 thereof, to A. A. Redfield, Esq., the referee theretofore appointed in said cause, at his office, No. 20 Nassau street, in the city of New York, within thirty days from and after the service upon them of a copy of said order, and that any claim against either of said firms not so presented should be excluded from participation in the fund in question and from all funds that might come into the hands of the receiver in said suit; and that the said referee take proof in support of and adverse to the validity of any and all claims so submitted to him and determine upon the validity thereof and the amount justly due for principal and interest thereon, and from time to time report, as shall seem convenient to him, said claims, together with his findings of law and fact thereon; and said order further provided for the manner of serving the same upon the creditors of said firms of Davis, Sprague and Co. or Jas. W. Davis and Associates, as by said order now remaining in the office of the clerk of said supreme court, a copy of which this defendant brings here into court, will more fully and at large appear.

That a large number of creditors of said Davis, Sprague and Co. and of the said Jas. W. Davis and Associates, claimants against the said funds, appeared before said referee in pursuance of said
30 order and made their claims in said cause in the nature of petitions before said referee; and this defendant avers that the plaintiff in this case appeared before said referee under said notice and filed his claim against the funds in the hands of the said receiver, and the claims presented by him were on the identical pieces of commercial paper and for the same causes of action upon which this suit is brought, and that it was in issue and tried before said referee on the hearing touching said claims of the plaintiff whether there were or were not two distinct firms—the one known as Davis, Sprague and Co. and the other as Jas. W. Davis and Associates, what persons composed each firm, to what extent said firms and their members were liable on the claims filed before said referee, and, amongst others, on the claims filed by the plaintiff in this case; whether this defendant and his associates of the firm of Davis, Sprague and Co. were members of the firm of Jas. W. Davis and

Associates or were liable on the said debts claimed by the plaintiff in this case, and whether this defendant was liable on any of the claims presented by the plaintiff herein; that the plaintiff herein filed his claims under said order, appeared before said referee in per-
31 son and by attorney and introduced testimony in support of his claims upon the issues aforesaid, and that the plaintiff became in law and in fact a party and privy to said cause and proceedings.

That afterwards, on the 9th and 16th of November, A. D. 1871, and March 14th, 1872, said A. A. Redfield, referee, filed certain reports in said cause in which he found that the said firm of Davis, Sprague and Co. were not liable on the claims filed by the plaintiff in this case before him, and that this defendant was not liable therefor.

And that afterwards, on, to wit, the 23rd day of June, A. D. 1873, it was ordered, adjudged, and decreed by the said supreme court that the said reports be, and the same were in all respects, ratified and confirmed; and it was further ordered, adjudged, and decreed by said court as follows, to wit:

At a special term of the supreme court of the State of New York, held at the chambers thereof, in the new court-house, in the city of New York, on the 21st day of June, 1873.

Present: Hon. D. P. Ingraham, justice.

WILLIAM F. DURANT *et al.*, Plaintiffs,
ag'st
JAMES W. DAVIS, JAMES H. GESSNER, *et al.*, Defendants.

32 This cause having been referred to Amasa A. Redfield, Esq., to hear and determine the same, and the said referee having made several reports herein, dated respectively November 9th, 1871, November 16th, 1871, and March 14th, 1872, and the same having been duly filed, and the said referee having made his final report herein, dated June 7th, 1873, and the same having been also duly filed—

Now, on motion of Clark Bell, attorney for the plaintiffs, after hearing D. W. Gillett, of counsel for Davis and Gessner, and I. I. Kellogg, Esq., of counsel for the trustees, and Wm. E. Stiger, Esq., of counsel for Henry J. Rogers, ordered that a final decree be entered in this action as follows, viz:

It is ordered, adjudged, and decreed that the said reports be, and that the same are in all respects hereby, ratified and confirmed; and it is further adjudged, ordered, and decreed that on or about the 19th or 20th days of November, 1867, and the third day of December, 1867, the defendant James W. Davis, at the city of New York, made a contract in writing with the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, &c., par-
33 ties of the second part, for the delivery by the said James W. Davis and his associates unto the said parties of the second part of a large quantity of railroad ties, lumber, and timber along

the line of the Union Pacific railroad, then in process of construction, at certain prices and upon certain terms and conditions; a copy of which contract is annexed to the complaint in this action.

That subsequently and at various times between the 20th day of November, 1867, and the 20th day of November, 1868, the said Davis, for a valuable consideration to him paid, assigned proportionate interests in the profits and business of the said contract to and associated with himself in the performance of said contract certain parties, to wit, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, James H. Gessner, and H. C. Crane, trustee for W. D. Train.

That said assignments are fully set forth in the report of the referee herein, bearing date November 9th, 1871.

That the said parties owning said several interests prosecuted the work of making and delivering the ties, timber, and lumber so as aforesaid contracted to be delivered, and did, between the 20th day of November, 1867, and the first day of January, 1869, deliver
34 to the said defendants, Durant and others, trustees as aforesaid, one million ties and — feet of lumber and timber, for which the said trustees became indebted to the said parties so associated in the performance of the contract first above mentioned; on account of which indebtedness the said trustees have paid to the said associates large sums of money from time to time as the work under said contracts progressed.

That a profit was realized by said associates for the work done and materials furnished under said million-tie contract and in the business connected therewith of the sum of two hundred and twenty-five thousand dollars ($225,000).

That the said sums of money so received from said trustees on account of such indebtedness came into the possession of the defendants James W. Davis and James H. Gessner, two of said associates, and were by them expended and disbursed in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and material specified in the contract set out in Schedules A, B, and C, annexed to the complaint herein, and known as the million-tie contract.

35 That for such work done and materials furnished the said trustees became and are indebted unto the said James W. Davis and James H. Gessner.

That the sums of money received from the trustees on account of the first above-mentioned contract and belonging to the first above-mentioned associates or parties interested in the said contract, called the million-tie contract, was so used and expended by the said James W. Davis and James H. Gessner without the knowledge, privity, assent, or concurrence of the plaintiffs or any of said associates besides said Davis and Gessner, and that none of said associates, except Davis and Gessner, were associated in the said business done and transacted by Davis and Gessner outside of said first-named contract, or were in anywise interested therein as partners or participants in the profits or benefits thereof.

That all of the said work so done by the said Davis and Gessner, outside of and not relating to the contract set forth in the complaint in Schedules A, B, and C, and known as the million-tie contract, was done along the line of the Union Pacific railroad at points westward of the point known as Elk Mountain, and that the business so done at the points west of Elk Mountain was done by the
36 said James W. Davis and James H. Gessner in the name and under the style sometimes of "James W. Davis and Associates," and sometimes in the name and under the style of "James W. Davis, Trustee."

That the work done and performed and materials furnished in the execution of the contract set out in the complaint in Schedules A, B, and C, and known and distinguished as the million-tie contract, was all done, performed, and furnished along the line of the Union Pacific railroad at points eastward of a point known as Elk Mountain, and that their relation was as is set out in the certificates set forth in said report.

That no partnership existed at any time and no articles of agreement of partnership were ever made between the parties in interest in the said contract known as the million-tie contract; that the transaction was a special venture, in which the various parties held respectively the several interests or shares mentioned and specified in the report of the referee herein, dated November 9th, 1871, and that no articles of partnership were ever made between the said James W. Davis and James H. Gessner in relation to the work done west of Elk Mountain.

That the parties aforesaid associated in interest in the million-tie contract became and were the owners of a large quantity
37 of ties, lumber and timber, and other materials, in the progress of their work, in excess of and beyond the quantity stipulated to be delivered by the terms of the said contract, which material they have, since the completion of the said contract, sold and delivered to the trustees aforesaid, for which the said trustees became and are indebted to the said parties.

It is further adjudged that the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. M. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific railroad, are indebted, under the contract of settlement referred to in the report of the referee herein, bearing date March 14, 1872, to James W. Davis and his said associates in the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14th, 1872, the said sum being the amount due from said trustees to said James W. Davis and said associates or to any of them individually, arising out of said million-tie contract or the second contract for work done and materials furnished west of Elk Mountain, and that such payment by the said trustees shall be a release to them of all liability on their part by reason of the service upon them of the said trustee process.

38 It is further adjudged that said James W. Davis and his said associates do recover of the said trustees the said sum of

sixty-four thousand two hundred and thirty-eight and twenty-one one-hundredths dollars ($64,238.21), with interest from March 14, 1872, and that the same be paid into the hands of the receiver heretofore appointed in this action, to be disbursed as hereinafter directed.

It is further adjudged that there is due to the associates of said Davis and Gessner in the million-tie contract, and that they do recover from James W. Davis and James H. Gessner, the sum of two hundred and twenty-five thousand dollars ($225,000.00), being the amount of profits realized by said associates for the work done and materials furnished under said million-tie contract and in the business connected therewith, and used and expended by said James W. Davis and James H. Gessner, without the knowledge, privity, assent, or concurrence of any of the associates in said million-tie contract, except Davis and Gessner, in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of an- unconnected with the work and materials done and furnished under the million-tie contract.

39 It is further adjudged that all persons, parties, and corporations named in clauses one and two of the report of the referee herein of November 16th, 1871, having appeared, filed their claims, & proved the same before the referee, & the same having been adjusted & reported by the said referee, shall be considered as adjudicated upon as to the amounts claimed by them respectively.

That those claims so embraced in clause one of said report of Nov. 16th, 1871, are not chargeable to the parties associated in the million-tie contract or to any fund that may come into the hands of the receiver herein belonging to said contract.

It is further adjudged that said sum of sixty-four thousand two hundred and thirty-eight twenty-one one-hundredths dollars ($64,238.21) and interest from March 14, 1872, found due from said trustees to James W. Davis and Associates and to be paid into the hands of the receiver herein shall be disbursed by the said receiver as follows, viz:

1st. He shall pay the fees of the referee herein.

2nd. The costs of the parties to this suit, to be taxed by the clerk of this court, and that the referee herein report what sum would be a proper allowance for counsel fee and additional allowance

40 under section 309 of the code to plaintiff's attorney, to the attorney and counsel for Davis and Gessner, and to the attorneys of the trustees to be paid out of said fund.

3rd. The balance of said fund to be distributed *pro rata* among the persons, parties, and corporations named as creditors in clause one of the report of the referee herein dated November 16th, 1871, and the associates of James W. Davis under the million-tie contract.

The basis of calculation being the amounts found due said persons, parties, and corporations respectively in clause one of said report of November 16th, 1871, and the amount found due said associates in the million-tie contract as hereinbefore set forth, viz., $225,000.00.

It is further adjudged that the receiver herein shall retain possession of the amount or share due to the associates in the million-tie contract, as last above provided, and distribute the same *pro rata* among the persons, parties, and corporations mentioned in clause two of the report of the referee herein dated November 16th, 1871.

Enter.

(Signed) D. P. I.

Endorsed: "C. E. L."

That the said causes of action of the plaintiff were embraced in clause one of the report of the said referee dated November 16th, 1871.

41 This defendant avers that said plaintiff might have appealed from the order and decree of said court, so far as the same had respect to the claims of said plaintiff heard and determined before said referee, and that theplaintiff in this cause has acquiesced in said decree; has taken his dividend upon said claims from the fund set apart in said proceedings for the creditors of James W. Davis and Associates; that said judgment and decree is now in full force and effect; all of which will more fully and at length appear by the record and proceedings in said cause from the supreme court of the city, county, and State of New York, an authenticated copy of which defendant brings here into court, and that said plaintiff is estopped from claiming or insisting that said causes of action upon which this suit is brought are valid causes of action against this defendant as a member of the firm of James W. Davis and Associates; and this he is ready to verify. Wherefore he prays judgment, etc.

Endorsed: Filed Ap'l 20, 1885. Wm. H. Bradley, clerk.

42 On the same day, to wit, on the twentieth day of April, 1885, came the plaintiff, by his attorney, and filed in said clerk's office his similiter to the first and second pleas, replication to sixth and seventh pleas, and demurrer to third, fourth, fifth, and eighth pleas in said entitled cause; which said similiter, replication, and demurrer are in the words and figures following, to wit:

In the Circuit Court of the United States.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, Impleaded, &c. } In Assumpsit

And the plaintiff, as to the plea of the defendant by him first above pleaded, and whereof he has put himself upon the country, doth the like.

HENRY C. WHITNEY,
Attorney for Plaintiff.

And, as to the plea of the defendant by him secondly above pleaded, and whereof he has put himself upon the country, the plaintiff doth the like.

HENRY C. WHITNEY,
Attorney for Plaintiff.

And the plaintiff, as to the said pleas of the said defendant by him thirdly, fourthly, fifthly, and eighthly above pleaded,
43 saith that the said several pleas and each one thereof are and is not sufficient in law. Wherefore he prays judgment, &c.

HENRY C. WHITNEY,
Attorney for Plaintiff.

And the plaintiff, as to the plea of the defendant by him sixthly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged ought not to be barred from having his aforesaid action, because he says that the said firm of Jas. W. Davis & Associates did not pay to the plaintiff the moneys in the said sixth plea in that behalf mentioned in full satisfaction and discharge of the several promises and sums of money in the said declaration mentioned in manner and form as the defendant has above in that plea alleged; and this the plaintiff prays may be enquired of by the country, &c.

HENRY C. WHITNEY,
Attorney for Plaintiff.

And the defendant doth the like.

CHAS. H. LAWRENCE,
Att'y for Wm. F. Durant.

And the plaintiff, as to the plea of the defendant by him seventhly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged ought not to be barred from having his aforesaid action, because he says that no drafts for $125,000 or for any
44 other sum or amount were deposited with plaintiff upon an agreement that the plaintiff should pay drafts and acceptances of Jas. W. Davis & Associates then outstanding or which should be thereafter made to an amount equal to the sum of the drafts deposited with plaintiff for collection for account of said Jas. W. Davis & Associates or for any other sum, nor are the promises and undertakings in plaintiff's declaration mentioned founded upon drafts or acceptances of said Jas. W. Davis & Associates which were agreed should be paid by the plaintiff from the avails of the alleged drafts first herein mentioned, nor were the sums of money set forth in plaintiff's declaration as due from Jas. W. Davis & Associates ever paid in the way and manner averred in said plea or otherwise howsoever; and this the plaintiff prays may be enquired of by the country, &c.

HENRY C. WHITNEY,
Attorney for Plaintiff.

And the defendant doth the like.

CHAS. H. LAWRENCE,
Att'y for Wm. F. Durant.

Endorsed: Filed Ap'l 20, 1885. Wm. H. Bradley, cl'k.

45 On the same day, to wit, on the twentieth day of April, in the adjourned March term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, &c. } Assumpsit.

Now come the parties, by their attorneys, and now come on to be heard the demurrer of the plaintiff to the third, fourth, fifth, and eighth pleas herein; and, after hearing the arguments of counsel, the court overrules the demurrer to the said third, fourth, and fifth pleas and takes under advisement the demurrer as to said eighth plea.

Afterwards, to wit, on the ninth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, &c. } Assumpsit.

46 On motion of the plaintiff, by his attorney, leave is given him to file special counts to his declaration, and ordered that the pleas of the defendant Durant stand to the declaration as amended, and that plaintiff's former similiter to first and second pleas, and demurrer of plaintiff to third, fourth, and fifth pleas, and replication to sixth and seventh pleas stand, and leave to plaintiff to reply double to the eighth plea; and the demurrer of the plaintiff to the third, fourth, and fifth pleas herein now coming on to be heard, after hearing the arguments of the counsel, the court takes the same under advisement.

On the same day, to wit, on the ninth day of November, 1885, came the plaintiff, by his attorney, and filed in said clerk's office his special counts to his declaration in said entitled cause; which said special counts are in the words and figures following, to wit:

Special Counts.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court of the United States within and for the Northern District of Illinois.

47 Henry J. Rogers, who is a citizen of the State of Wisconsin, the plaintiff in this case, complains of James W. Davis and Mordecai B. Sprague, who are citizens of the State of Minnesota; William F. Durant, who is a citizen of the State of Illinois; William Ruth, who is a citizen of the State of Colorado; Henry C. Crane, trustee of Wilhemina Davis Train, who is a citizen of the State of New York, and Timothy P. Richards, who is a citizen of another State than Wisconsin, but which State is unknown to plaintiff, surviving and late partners in business by and under the names, style, and firm of James W. Davis & Associates.

1. For that whereas one Charles A. Henry heretofore, to wit, on the twelfth day of April, A. D. 1869, at Cheyenne, to wit, at the district aforesaid, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and then and there directed the said bill of exchange to the said defendants by their firm names and style of James W. Davis and Associates, and thereby then and there requested the said defendants, at sight thereof, to pay to one Charles McDonald or order the sum of nine hundred and forty-five $\frac{99}{100}$ dollars for value received, and then and there delivered the said bill of exchange to the said Charles McDonald; which said bill of exchange the said defendants afterwards, by their names as aforesaid, to wit, on the day last aforesaid, at Cheyenne, to wit, at
48 the district aforesaid, upon sight thereof accepted; and the said Charles McDonald, to whom or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making thereof and before the payment of the said sum of money therein specified, to wit, on the day & year last mentioned, at Cheyenne, to wit, at the district aforesaid, endorsed the said bill of exchange, by which said indorsement he, the said Charles McDonald, then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to one Rogers & Company, and then and there delivered the said bill of exchange so indorsed as aforesaid to the said Rogers & Company, and the said Rogers & Company, to whom or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making of the said bill of exchange and upon the payment of the said sum of money therein specified, to wit, on the day last aforesaid, at Cheyenne aforesaid, to wit, at the district aforesaid, indorsed the said bill of exchange, by which said last-mentioned indorsement the said Rogers & Company then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said

plaintiff, and then and there delivered the said bill of ex-
49 change, so endorsed as last aforesaid to the said plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified according to the tenor and effect of the said bill of exchange and of their acceptance thereof; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified according to the tenor and effect of the said bill of exchange and of their said acceptance thereof, upon request.

And whereas, also, one John W. McIntyre afterwards, to wit, on the thirteenth day of April, A. D. 1869, at Cheyenne, to wit, at the district aforesaid, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to the said defendants by their firm names and style of James W. Davis and Associates, and thereby then and there requested the said defendants, at sight thereof, to pay to one Rogers & Co. or order the sum of two hundred dollars for value received, and then and there delivered the said bill of exchange to the said Rogers & Co., which said bill of exchange the said
50 defendants afterwards, by their firm name as aforesaid, to wit, on the day last aforesaid, at Cheyenne, to wit, at the district aforesaid, upon sight thereof, accepted, and the said Rogers & Co., to whom or to whose order the payment of the said sum of money in the said bill of exchange specified was to be made, after the making thereof and upon the payment of the said sum of money therein specified, to wit, on the day and year last mentioned, at Cheyenne, to wit, at the district aforesaid, indorsed the said bill of exchange, by which said indorsement the said Rogers & Co. then and there ordered and appointed the said sum of money in the said bill of exchange specified to be paid to the said plaintiff, and then and there delivered the said bill of exchange so endorsed as aforesaid to the said plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified according to the tenor and effect of the said bill of exchange and of their acceptance thereof; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said pl'ff to pay him the said sum of money in the said bill of exchange specified, according to the
51 tenor and effect of the said bill of exchange and of their said acceptance thereof, upon request.

3. And for that whereas the said defendants afterwards, to wit, on the eighth day of May, A. D. 1869, at Cheyenne, to wit, at the district aforesaid, by their firm name as aforesaid, made their certain banker's check, bearing date the day & year last aforesaid, and thereby then and there directed the said check to Rogers & Co., bankers, Cheyenne, Dakota, and thereby then and there required the

said Rogers & Co. to pay to one F. Haggerty or order three hundred & eighty-eight $\frac{45}{100}$ dollars, and then & there delivered the said banker's check to the said F. Haggerty, and the said F. Haggerty afterwards and upon the payment thereof, endorsed the said check to the plaintiff and delivered the same so endorsed to the said pl'ff, by which endorsement & delivery the said F. Haggerty then and there ordered and appointed the said sum of money in the said check specified to be paid to the said pl'ff, and the pl'ff avers that after the making of said check and upon the payment of the said sum of money therein specified, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, the said check was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there re-
52 quested to pay the said sum of money therein specified according to the tenor and effect thereof, but that the said Rogers & Co. did not nor would, at the said time when the said check was so shown and presented to them for payment thereof as aforesaid or at any time afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do; whereof the said def'ts afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, had notice, by means whereof they, the said defendants, then and there became liable to pay to the said pl'ff the said sum of money in the said bank check specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said check specified when they, the said defendant-, should be thereunto afterwards requested.

4. And for that whereas the said defendants afterwards, to wit, on the 17th day of May, 1869, at Cheyenne, to wit, at the district aforesaid, by their firm name as aforesaid, made their certain other banker's check, bearing date the day and year last aforesaid,
53 and thereby then and there directed the said last-mentioned banker's check to one Rogers & Co., bankers, at Cheyenne, and thereby then and there required the said Rogers & Co. to pay to one T. C. Brush or order ninety-nine $\frac{35}{100}$ dollars, and then and there delivered the said check to the said T. C. Brush, and the said T. C. Brush afterwards and before the payment thereof endorsed the said check to the plaintiff and delivered the same so endorsed to him, by which endorsement and delivery the said T. C. Brush then and there ordered and appointed the said sum of money in the said check specified to be paid to the said pl'ff; and the pl'ff avers that after the making of the said check and before the payment of the said sum of money therein specified, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, the said check was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect thereof, but that the said Rogers & Co., did not nor would,

at the said time when the said check was so shown and presented to them for payment thereof as aforesaid or at any time afterwards, pay the said sum of money therein specified or any part
54 thereof, but then and there wholly neglected and refused so to do, whereof the said defendants afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, had notice, by means whereof the said defendants then and there became liable to pay to the said pl'ff the said sum of money in the said bank check specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bank check specified when they, the said defendants, should be thereunto afterwards requested.

5. And whereas, also, afterwards the said defendants, on the 24th day of May, 1869, at Cheyenne, to wit, at the district aforesaid, by their firm name as aforesaid, made their certain bill of exchange in writing, bearing date the day & year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to John H. Young & Co. or to their order twenty-two thousand seven hundred and thirty-eight $\frac{79}{100}$ dollars for value received, and then and there delivered
55 the said bill of exchange to the said John H. Young & Co., and the said John H. Young & Co. then and there endorsed and delivered the said last-mentioned bill of exchange to one Rogers & Co., who then and there endorsed and delivered the same bill to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on June 26th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified
56 when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day & year last aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said

pl'ff to pay him the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

6. And whereas, also, the said defendants afterwards, to wit, on the 28th day of May, 1869, at Cheyenne, to wit, at the district aforesaid, by their said firm name as aforesaid, made their certain other bill of exchange in writing, bearing date the day & year last aforesaid, and then and there directed the said last-mentioned bill of exchange to Rogers & Co., by which said last-mentioned bill of exchange the said defendants then and there requested the said Rogers and Co., sixty days after the date thereof, to pay to one H. Robinson or to his order one hundred and fifty-seven $\frac{5}{100}$ dollars for value rec'd, and then and there delivered the said bill of exchange to the said H. Robinson, and the said H. Robinson then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 1st, 1867,
57 at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers and Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to them for payment as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, there had notice, by means whereof the said defendants then and there became liable to pay to the said pl'ff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid; undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

7. And whereas, also, the said defendants afterwards, to wit,
58 on the 28th day of May, 1869, at Cheyenne, to wit, at the district aforesaid, by and under their firm name as aforesaid, made their certain other bill of exchange in writing, bearing date the day & year last aforesaid, and then and there directed the last-mentioned bill of exchange to Rogers & Co., by which said last-mentioned bill of exchange the said defendants then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to Wyatt & Jones or order one thousand and thirty-eight $\frac{2}{100}$ dollars for value received, and then and there delivered the said bill of exchange to the said Wyatt & Jones, and they then & there endorsed and delivered the said last-mentioned bill of exchange to the said pl'ff; and

the said pl'ff avers that afterwards, when the said last-mentioned bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 1st, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and they were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown for payment as aforesaid or at any time before or afterwards, pay the said
59 sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, then had notice, by means whereof the said defendants then and there became liable to pay to the said pl'ff the said sum of money in the said bill of exchange specified when, the said defendants should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at the district afoersaid, undertook and then and there faithfully promised the said pl'ff to pay him the said last-mentioned sum of money in the said bill of exchange specified when they, the said defendants, should thereunto afterwards —.

8. And whereas, also, the said defendants afterwards, to wit, on the 31st day of May, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain other bill of exchange in writing, by and under their firm name of James W. Davis & Associates, bearing date the day and year last aforesaid, & then and there directed the said last-mentioned bill of exchange to Rogers & Co., by which said last-mentioned bill of exchange the said defendants then and
60 there requested the said Rogers & Co., sixty days after the date thereof, to pay to one A. H. Hayett or order seventy-one dollars and 69 cents for value rec'd, and then and there delivered the said bill of exchange to the said A. H. Hayett, and the said A. H. Hayett then and there endorsed and delivered the said bill of exchange to the said plaintiff; and the said pl'ff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 3d, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to them for payment as aforesaid or at any time before or afterward, pay the said sum of money therein specified or any part thereof, but then & there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, had notice, by means

whereof the said defendants then and there became liable to
61 pay to the said plaintiff the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook & then and there faithfully promised the said pl'ff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said def'ts, should be thereunto afterwards requested.

9. And whereas, also, one Hance & Ruth afterwards, to wit, on the 2d day of June, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain bill of exchange in writing, bearing date the day & year last aforesaid, and then and there directed the said bill of exchange to the said defendants by their fiam names and style of Jas. W. Davis & Associates, and thereby then and there requested the said defendants, sixty days after the date thereof, to pay to H. J. Rogers & Company or order two hundred and thirty-two $\frac{82}{100}$ dollars for value received, and then and there delivered the said bill of exchange to the said H. J. Rogers & Company, which said bill of exchange the said defendants afterwards, by their firm name as aforesaid, to wit, on the day last aforesaid, at Cheyenne, to
62 wit, at the district aforesaid, upon sight thereof accepted and the said H. J. Rogers & Company endorsed and delivered the said bill of exchange to the said plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified according to the tenor and effect of the said bill of exchange & of their acceptance thereof; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange and of their acceptance thereof, upon request.

10. And whereas, also, afterwards the said defendants, to wit, on the 2d day of June, 1869, at Cheyenne, to wit, at the district aforesaid, by their firm names and style of James W. Davis & Associates, made their certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to James McQuillan
63 or order three hundred and fourteen $\frac{13}{100}$ dollars for value received, and then and there delivered the said bill of exchange to the said James McQuillan, and the said James McQuillan then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 4th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange

was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, then had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in
64 the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

11. And whereas, also, the said defendants afterwards, to wit, on the 2d day of June, 1869, at Cheyenne, to wit, at the district aforesaid, by and under their firm names & style of James W. Davis & Associates, made their certain other bill of exchange in writing, bearing date the day & year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to M. V. Lee or order one hundred & thirty-eight $\frac{55}{100}$ dollars for value received, and then and there delivered the said bill of exchange to the said M. V. Lee, and the said M. V. Lee then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of ex-
65 change became due and payable according to the tenor and effect thereof, to wit, on August 4, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto after-

wards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill
66 of exchange specified when they, the said defendants, should be thereunto afterwards requested.

12. And whereas, also, afterwards the said defendants, to wit, on the 2d day of June, 1868, at Cheyenne, to wit, at the district aforesaid, by their firm name of James W. Davis & Associates, made their certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to James Crawford or order three hundred dollars for value received, and then and there delivered the said bill of exchange to the said James Crawford, and the said James Crawford then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 4th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time
67 when the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, then had notice; by means whereof the said defendants then & there became liable to pay to the said pl'ff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

13. And whereas, also, the said defendants afterwards, to wit, on the 2d day of June, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and — directed the said bill of exchange to Rogers & Co., by which said bill of ex-
68 change the said defendants then and there, by and under the firm names — style of James W. Davis & Associates, requested the said Rogers & Co., sixty days after the date thereof, to pay to Thomas B. Biggers or order two hundred & ninety-five dollars and

six cents for value received, and then and there delivered the said bill of exchange to the said Thomas B. Biggers, and the said Thomas B. Biggers then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 4th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the
69 day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, then had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

14. And whereas, also, the said defendants afterwards, to wit, on the 2d day of June, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain other bill of exchange in writing, bearing date the day & year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants, by and under their firm names and style of James W. Davis and Associates, then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to John M. Mansfield or order one hundred & eighty-nine dollars and eighty-cents for value received, and then and there delivered the
70 said bill of exchange to the said John M. Mansfield, and the said John M. Mansfield then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 4th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said last-mentioned bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as afore-

said or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, there had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified when they, the said defendants, should
71 be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

15. And whereas, also, the said defendants afterwards, viz., on the 3d day of June, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants, by and under the names and style of James W. Davis and Associates, then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to Samuel Hanse or order one hundred dollars for value received, and then and there delivered the said bill of exchange to the said Samuel Hanse, and the said Samuel Hanse then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor
72 and effect thereof, to wit, on August 5th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, then had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified

73 when they, the said def'ts, should be thereunto afterwards requested.

16. And whereas, also, the said defendants afterwards, to wit, on the 4th day of June, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants, by and under their firm names of James W. Davis & Associates, then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to J. M. Mansfield or order six hundred & thirty-eight dollars and 96 cents for value received, and then and there delivered the said bill of exchange to the said J. M. Mansfield, and the said J. M. Mansfield then and there endorsed and delivered the said last-mentioned bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 6th, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and

74 effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said last-mentioned bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused so to do, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, there had notice, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, — and then and there faithfully promised to said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

17. And whereas, also, the said defendants afterwards, viz., on the 21st day of June, 1869, at Cheyenne, to wit, at the district aforesaid, made their certain other bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed

75 the said bill of exchange to Rogers & Co., by which said bill of exchange the said defendants, by and under the names and style of James W. Davis & Associates, then and there requested the said Rogers & Co., sixty days after the date thereof, to pay to H. J. Rogers & Co. or order three thousand & eighty-four dollars and 52 cents for value received, and then and there delivered the said bill of exchange to the said H. J. Rogers & Co., and the said H. J. Rogers & Co. then and there endorsed and delivered the said last-mentioned

bill of exchange to the said plaintiff; and the said plaintiff avers that afterwards, when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, on August 23d, 1869, at Cheyenne, to wit, at the district aforesaid, the said bill of exchange was presented and shown to the said Rogers & Co. for payment thereof, and the said Rogers & Co. were then and there requested to pay the said sum of money therein specified according to the tenor and effect of the said bill of exchange, but the said Rogers & Co. did not nor would, at the said time when the said last-mentioned bill of exchange was presented and shown to the said Rogers & Co. for payment thereof as aforesaid or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but then and there wholly neglected and refused
76 so to do, of all which said several premises the said defendants afterwards, to wit, on the day and year last aforesaid, at Cheyenne, to wit, at the district aforesaid, had notice, by means whereof the said defendants then and there became liable to pay to the said pl'ff the said sum of money in the said bill of exchange specified when they, the said defendants, should be thereunto afterwards requested; and, being so liable, they, the said defendants, afterwards, to wit, on the day & year last aforesaid, at Cheyenne, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said last-mentioned bill of exchange specified when they, the said defendants, should be thereunto afterwards requested.

18. And whereas, also, one R. S. Van Tassell afterwards, to wit, on the 10th day of November, 1869, at Omaha, to wit, at the district aforesaid, made his certain bill of exchange to the said defendants, by their firm name and style of J. W. Davis & Associates, and thereby then and there requested the said defendants, thirty days after the date thereof, to pay to said Van Tassell or order the sum of two thousand one hundred & eighty-eight $\frac{54}{100}$ dollars for value received, which said bill of exchange the said defendants afterwards, by their firm name as aforesaid, to wit, on the day last
77 aforesaid, to wit, at the district aforesaid, upon sight thereof accepted and the said R. S. Van Tassell endorsed and delivered the said bill of exchange to the plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified according to the tenor and effect of the said bill of exchange & of their acceptance thereof; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said bill of exchange specified, according to the tenor and effect of the said bill of exchange and of their acceptance thereof, upon request.

19. And whereas one W. W. Corlett afterwards, to wit, on December 5th, 1869, at Cheyenne, to wit, at the district aforesaid, made his certain bill of exchange in writing, dated the day and year last aforesaid, and then and there directed the said bill of exchange to

the said defendants by their firm names and style of James W. Davis and Associates, and thereby then and there requested the said defendants, upon sight thereof, to pay to Rogers & Co. or order the sum of two hundred and fifty dollars for value received, and then and there delivered the said bill of exchange to the said
78 Rogers & Co., which said bill of exchange the said defendants afterwards, by their firm name as aforesaid, to wit, on the day last aforesaid, to wit, at the district aforesaid, upon sight thereof accepted and the said Rogers & Co. endorsed and delivered the said bill of exchange to the said plaintiff, by means whereof the said defendants then and there became liable to pay to the said plaintiff the said sum of money in the said bill of exchange specified according to the tenor and effect of the said bill of exchange and of their acceptance thereof; and, being so liable, they, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money when they should be thereunto afterwards requested.

20. And whereas one Samuel K. Dey afterwards, to wit, on the 21st day of February, 1870, at Cheyenne, to wit, at the district aforesaid, made his certain bill of exchange in writing, bearing date the day and year last aforesaid, and then and there directed the said bill of exchange to the said defendants by their firm names and style of James W. Davis & Associates, and thereby then & there requested the said defendants, at sight thereof, to pay to Rogers & Co. or order the sum of three hundred dollars for value received, and then and there delivered the said bill of exchange to the
79 said Rogers & Co., which said bill of exchange the said defendants afterwards, by their firm names as aforesaid, to wit, on the day and year last aforesaid, to wit, at the district aforesaid, upon sight thereof accepted and the said Rogers & Co. endorsed and delivered the said bill of exchange to the said plaintiff, by reason whereof and by force of the statute in such case made and provided the said defendants became liable to pay to the said plaintiff the said sum of money in the said last-mentioned bill of exchange specified according to the tenor and effect of the said bill of exchange and of their acceptance thereof; and, being so liable, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money in the said bill of exchange specified according to the tenor and effect of said bill of exchange and of their acceptance thereof.

And whereas, also, the said defendants afterwards, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-four, in said district, became and were indebted to the said plaintiff in the further sum of thirty thousand
80 (30,000) dollars of lawful money of the United States of America for money before that time lent and advanced by the said plaintiff to the said defendants and at the special instance

and request of the said defendants, and in the like sum for other money by the said plaintiff before that time paid, laid out, and expended for the said defendants and at the like special instance and request of the said defendants, and in the like sum for other money by the said defendants before that time had and received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff, and in the like sum for goods, wares, and merchandise before that time sold and delivered by the said plaintiff to the said defendants at the like special instance and request of the said defendants, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendant and at the like special request of the said defendants; and, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the day and year aforesaid and
81 at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested.

And whereas, also, the said defendants afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to the said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further sum of thirty thousand (30,000) dollars of like lawful money as aforesaid; and, being so found in arrear and indebted to the said plaintiff, the said defendants, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested; nevertheless, the said defendants (although often requested, etc., to wit, on the several days when the said bill
82 of exchange, checks, & acceptances became due and payable severally according to the tenor and effect thereof severally and oftentimes since, to wit, at the place last aforesaid) have not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendants have hitherto wholly neglected and refused and still do neglect and refuse, to the damage of the said plaintiff of thirty thousand (30,000) dollars, and therefore the said plaintiff brings suit, etc.

HENRY C. WHITNEY,
Plaintiff's Attorney.

It is hereby stipulated that the within counts may be filed as an amendment to the declaration.

CHAS. H. LAWRENCE,
Att'y for W. F. Durant.

Endorsed: Filed Nov. 9, 1885. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the second day of December, 1885, came the plaintiff, by his attorney, and filed in said clerk's office
83 his replications to the eighth plea of said defendant, William F. Durant, in said entitled cause; which said replications are in the words and figures following, to wit:

Replications.

The replication of Henry J. Rogers, plaintiff, to the eighth plea of said defendant, William F. Durant, impleaded, &c.

And the said plaintiff, as to so much of the said plea of the said defendant, William F. Durant, by him eightly above pleaded as avers that there were two partnerships, one known and designated as Davis, Sprague & Co. and the other known and designated as James W. Davis and Associates, and denies that said defendant, William F. Durant, was a member of the latter-named firm, and as avers that it was a matter in issue in said New York suit as to what various persons composed the respective firms of Davis, Sprague & Co. and James W. Davis & Associates, and as sets forth the rights of pl't'ff upon that judicial inquiry, and as avers that it became and was necessary in said suit to determine what persons were liable to the creditors of James W. Davis and Associates and what per-
84 sons were liable to the creditors of Davis, Sprague & Co., and as refers to the finding of the referee in said New York suit and the judgment of the court thereon to the effect that the defendant William F. Durant was not liable on the claims herein sued on, and that said claims were not chargeable to said defendant, William F. Durant, and his associates in the million-tie contract, says:

That he ought not to be barred from having or maintaining his aforesaid action thereof against him, said Wm. F. Durant, because he says that the said two alleged partnerships were one and the same, under a dual name, composed of the same individuals, organized for and that it performed the same objects and business, and known, called, and designated indifferently by either or both of said names in various phases of the business operations of said partnership, and that it was not in issue in the New York suit referred to in said plea, so far as the issues which were tendered to this plaintiff or in which he had a right to litigate were concerned, whether there were two distinct firms, the one known as Davis, Sprague & Co. and the other as Jas. W. Davis & Associates, or what
85 persons composed the said firms respectively, or to what extent the members of said firms were liable on the claims filed before the referee appointed in the New York suit in said plea referred to, or whether the defendant Wm. F. Durant and his associates of the firm of Davis, Sprague & Co. were members of the firm

of Jas. W. Davis & Associates or were liable on the debts claimed by the plaintiff in this case, or whether the defendant was liable on any of the claims presented by the pl't'ff herein, nor did the pl't'ff herein introduce testimony upon any of said issues or become in law or in fact a party and privy to said cause and proceeding, nor had he any right of appeal, nor could he have appealed from the finding of the court except as to the amount, validity, and ownership of said claims; and the said plaintiff in fact saith that in the course of the proceedings in said New York suit an order was entered and recorded as follows, viz: "It is ordered that all persons, parties, and corporations having claims against the firms of Davis, Sprague & Co. and James W. Davis and Associates, or either or both of said firms, present the same, together with their proofs in support of the validity thereof, to A. A. Redfield, Esqr., the referee
86 heretofore appointed in this action, at his office, No. 20 Nassau street, in the city of New York, within twenty days from and after the service upon them, respectively, of a copy of this order; and it is further ordered that any claim against either of said firms not so presented within the time above limited shall be excluded from participation in the fund in question in this action and from all funds that may come into the hands of the receiver herein; and it is further ordered that the said referee take proof in support of and adversely to the validity of any and all claims so submitted to him and determine upon the validity thereof and the amount justly due for principal and interest thereon, and from time to time report, as shall seem convenient for him, said claims, together with his findings of law and fact thereon."

And the said plaintiff avers that he presented the aforesaid claims, being the same claims impleaded in this suit, under the order aforesaid, and that he did not offer any proof nor was any proof offered in his behalf, nor did he use any proof (if any) offered by any other person or parties as to what persons composed the firm of Davis, Sprague & Co. or the firm of Jas. W. Davis & Associates or were liable to the creditors or either thereof, nor was plaintiff
87 allowed to offer or to use any such proof, and that the only proof this pl't'ff offered or that was offered for or used by him in the New York suit was as to the amount, validity, and ownership of said claims, and that no other questions or issues were *res judicata* as to plaintiff except said last-named questions or issues, and that the findings of the referee in the said New York suit and the judgment of the court thereupon to the effect that the defendant William F. Durant was not liable on the claims herein sued on, and that said claims were not chargeable to said defendant, Wm. F. Durant and his associates in the "million-tie" contract, was unauthorized by the issues in said suit to which pl't'ff was a party, and were beyond the powers of said court and were not *res judicata* as to this plaintiff, nor was the question of the personal liability of the defendant Wm. F. Durant or of the personal liability of any other of said defendants involved in said adjudication, so far as this plaintiff is concerned, nor did this plaintiff acquiesce in said judgment, except so far as the same related to the amount, validity,

and ownership of said claims; and this the said defendant is ready to verify. Wherefore he prays judgment, &c.

HENRY C. WHITNEY,
Attorney for Plaintiff.

88 And for a further replication to defendant's plea by him eighthly above pleaded the said pl't'ff says *precludi non*, because he says that before the said pl't'ff acquired any of the obligations sued on herein the said defendant, William F. Durant, held himself out to said pl't'ff as a partner in the firm of James W. Davis & Associates and never renounced or disclaimed said holding out as a partner until after plaintiff had acquired all of said claims, and that said pl't'ff was induced by such holding out of said defendant, Durant, as a partner to acquire said claims and each thereof, and pl't'ff would not have acquired them but for such holding out of said Durant to him as a partner; and this the said pl't'ff is ready to verify. Wherefore he prays judgment, &c.

HENRY C. WHITNEY,
Attorney for Plaintiff.

(Endorsed:) Filed Dec. 2, 1885. Wm. H. Bradley, cl'k.

89 On the same day, to wit, on the second day of December, 1885, came William F. Durant, impleaded, &c., by his attorney, and filed in said clerk's office his demurrer to the first and second replications of the said plaintiff to the eighth plea in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, }
Northern District of Illinois, }

In the Circuit Court Thereof.

HENRY J. ROGERS
vs.
JAMES W. DAVIS, WM. F. DURANT, *et al.*

Now comes defendant William F. Durant, impleaded as defendant in the above-entitled cause, by Charles H. Lawrence, his attorney, and says that the first and second replications of the said plaintiff to the said eighth plea of the said defendant and the matters therein contained, in manner and form as the same are above pleaded and set forth in said replication, severally are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said de-
90 fendant, is not bound by law to answer the same; and this the said defendant is ready to verify.

Wherefore by reason of the insufficiency of the said replications and each of them in this behalf the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc.

And the said defendant, according to the form of the statute in such case made and provided, here states and shows to the court the following causes of demurrer in law to the said replications severally—that is to say:

The said first replication has no proper conclusion.

The said first replication, while traversing certain allegations of said eighth plea, is not a plea of *nul tiel* record.

Said first replication is neither a plea of *nul tiel* record nor does it confess and avoid said eighth plea.

Said first replication by its averments seeks to vary the judgment and record pleaded in said eighth plea.

Said first replication avers matters and facts in regard to the record and judgment set up in said eighth plea for the purpose of explaining said eighth plea and denying its conclusions, and therefore amounts to a demurrer.

Said second replication to said eighth plea has no proper conclusion.

91 Said second replication to said eighth plea departs said plaintiff's declaration.

Said second replication to said eighth plea is not a plea in confession and avoidance and does not conclude to the country.

Said second replication is not a proper traverse of said eighth plea.

Said first and second replications and each of them, while in substance amounting respectively to a traverse of said eighth plea, are not nor is either of them in proper form a traverse of said plea.

That said first and second replication- are, and each of them is in certain other respects uncertain, informal, and insufficient.

CHARLES H. LAWRENCE,
Att'y for William F. Durant.

B. C. COOK, *Of Counsel.*

Endorsed: Filed Dec. 2, 1885. Wm. H. Bradley, clerk.

Among the files in said cause is the following paper, endorsed on the back: "Henry J. Rogers *vs.* William F. Durant, impleaded, &c."

Replication to 8th plea in words and figures as follows:

92 UNITED STATES OF AMERICA,
Northern District of Illinois,

In the Circuit Court Thereof.

HENRY J. ROGERS
vs.
JAMES W. DAVIS, WM. F. DURANT, *et al.*

Now comes defendant William F. Durant, impleaded as defendant in the above-entitled cause, by Charles H. Lawrence, his attorney, and says that the first, second, and third replications of the said plaintiff to the said eighth plea of the said defendant and the

matters therein contained, in manner and form as the same are above pleaded and set forth in said replication, severally are not nor is either of them sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same.

And this the said defendant is ready to verify.

93 Wherefore, by reason of the insufficiency of the said replications and each of them in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, etc.

And the said defendant, according to the form of the statute in such case made and provided, here shows and states to the court the following causes of demurrer in law to the said replications severally—that is to say:

The said first replication has no proper conclusion.

Said second replication amounts but to a plea of *nul tiel* record, and is not in proper form therefor.

Said second replication by its averments seeks to vary the record set up in said eighth plea.

Said third replication to said eighth plea is not a plea in confession and avoidance and does not conclude to the country.

Said third replication to said eighth plea departs said plaintiff's declaration

94 Said third replication is not a proper traverse of said eighth plea.

COOK & LAWRENCE,
Att'ys for Wm. F. Durant.

The Replications of Henry J. Rogers, Plaintiff, to the Eighth Plea of said Defendant, William F. Durant, Impleaded, &c.

First. And the plaintiff, as to the plea of the defendant by him eighthly above pleaded, says *precludi non*, because he says that there is not any record of the supposed proceeding in the said eighth plea mentioned remaining in said supreme court of New York in manner and form as the said defendant hath above in his said plea alleged; and this the said plaintiff is ready to verify, etc. Wherefore he prays judgment, &c.

HENRY C. WHITNEY, *For Pl'tiff.*

Second. And for a further replication to said eighth plea the said plaintiff says *precludi non*, because he says that although true it is that on September 26th, A. D. 1870, the said defendants, William F. Durant, M. B. Sprague, and P. S. Mattox, commenced a suit in the supreme court of New York against Timothy C. Richards, James W. Davis, James H. Gessner, William Ruth, Henry C. Crane for the objects stated in said plea, and true it is that on October 22nd, A. D. 1870, said cause was referred to A. A. Redfield, as sole

95 referee, to hear and determine the same and to take and state an account of all claims chargeable against the fund belong-

ing to said parties, and altho' true it is that it was an issue between said parties whether there were two firms composed of said several parties—the one known as Davis, Sprague & Co. and the other known as James W. Davis and Associates—and altho' true it is that the referee in said cause found and reported that there were two firms—the one known as Davis, Sprague & Co. and the other known as James W. Davis and Associates—and that said defendant, William F. Durant, was a member of the former firm and liable for its debts, but that he was not a member of the latter firm and not liable for its debts, and altho' true it is that said report of the referee was confirmed by the court, which was a court of general jurisdiction, and a judgment of said court rendered thereon, which judgment still remains in full force and effect, in nowise revised, annulled, or appealed from; and altho' true it is that on November 11th, A. D. 1870, an order was entered in said cause that all persons, parties, and corporations having claims against the firms of Davis, Sprague and Co. and James W. Davis & Associates or either or both of said firms
96 present the same, together with their proofs in support of the validity thereof, to said referee within 30 days from and after the service upon them of a copy of said order, and that any claim against either of said firms not so presented should be excluded from participation in the fund in said suit; although true it is that in or about the month of July, A. D. 1871, the same being within 30 days from and after service upon him of a copy of said order, the said plaintiff did present the same claims which are sued on herein and did offer proof of their ownership, validity, and amount, and altho' true it is that the said referee did find and report that said claims were valid only against the firm of James W. Davis and Associates and against the fund belonging to that firm, and that they were not valid against the firm of Davis, Sprague & Co., nor against the fund belonging to that firm, nor against any members of the latter-named firm—

Yet, for replication in this behalf, the plaintiff says that the issues in said suit in the supreme court of New York, whether there were two firms, the one known as Davis, Sprague & Co. & the other known as James W. Davis and Associates, and what persons composed said firms were all made up, and the proofs thereunder taken and completed substantially before said plaintiff herein was
97 notified to appear or before he became a party to said suit, and that he had no opportunity to and did not in fact participate either in making up the issues in those matters or in proving or in opposing proofs in reference thereto, and that he was no party to so much of said judgment as adjudicated such last-mentioned matters, and that he could not appeal from that part of said judgment, and that the only proof plaintiff herein was allowed to offer was as to the ownership, validity, and amount of his claims, and he is not bound or estopped by anything further; and this he is ready to verify. Wherefore, inasmuch as the said defendant William F. Durant hath not answered the said complaint of the plaintiff as to the breach and non-performance of the said premises

in the said declaration mentioned, he, the said plaintiff, prays judgment.

HENRY C. WHITNEY,
Att'y for Pl't'ff.

Third. And for a further replication to defendant's plea by him eighthly above pleaded the plaintiff says *precludi non*, because he says that before the said plaintiff acquired any of the obligations sued on herein the said defendant William F. Durant held himself out to said plaintiff as a partner in the firm of James W. Davis and Asssociates and never renounced or disclaimed said holding
98 out as a partner until after plaintiff had acquired all of said claims, and that said plaintiff was induced by such holding out of said defendant, Durant, as a partner to acquire said claims and each thereof, and plaintiff would not have acquired them but for such holding out of said Durant to him as a partner; and this the said plaintiff is ready to verify. Wherefore he prays judgment, &c.

HENRY C. WHITNEY,
Att'y for Pl't'ff.

99 Afterwards, to wit, on the first day of March, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, &c. } Assumpsit.

Now come the parties, by their attorneys, and the court having considered and being now fully advised upon the demurrer of the plaintiff to the third, fourth, and fifth pleas filed herein, sustains said demurrer as to said third plea and overrules it as to said fourth and fifth pleas; and the defendant's demurrer to first, second, and third replications of the plaintiff to the eighth plea filed herein having been heretofore submitted to the court, and the court being now fully advised thereon sustains said demurrer to said first and second replications and overrules said demurrer to said third replication; and, on motion, leave is given the plaintiff to amend the first replication, and to defendant to rejoin double.

100 Afterwards, to wit, on the twenty-first day of June, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, &c. } Assumpsit.

On motion of the defendant, by Cook and Lawrence, his attorneys, the plaintiff is hereby ruled to reply within one week to the fourth and fifth pleas filed herein or be adjudged to abide by his demurrer and to complete the issue herein.

101 Afterwards, to wit, on the twenty-third day of June, 1886, came William F. Durant, by his attorneys, and filed in said clerk's office his rejoinder to the third replication to the eighth plea in said entitled cause; which said rejoinder is in the words and figures following, to wit:

Rejoinder.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court Thereof.

HENRY J. ROGERS
vs.
WM. F. DURANT, Impleaded, &c. } Assumpsit.

Now comes the said defendant, Wm. F. Durant, impleaded, &c., by Cook & Lawrence, his att'ys, & by way of rejoinder to said plaintiff's replication by him secondly pleaded to the eighth plea of this defendant, this defendant says *actio non*, & because he says that he did not hold himself out to said plaintiff as a partner in or a member of the firm of Jas. W. Davis and Associates at the time when, &c., & in the manner as said plaintiff hath alleged thereof in said plea mentioned.

And of this the said defendant puts himself upon the country.

WM. F. DURANT,
By COOK AND LAWRENCE,
His Att'ys.

Endorsed: Filed June 23, 1886. Wm. H. Bradley, clerk.

102 Afterwards, to wit, on the thirtieth day of June, in the adjourned May term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, Impleaded with JAMES W. DAVIS *et al.* } Assumpsit.

This cause having been heretofore argued upon the demurrers of

plaintiff to the third, fourth, and fifth pleas of said defendant Durant and the demurrers of said defendant to the first and second replications of said plaintiff to the eighth plea of said defendant and, the court having sustained said plaintiff's demurrer to said third plea and the defendant having elected to abide said plea, and the said demurrers to said fourth and fifth pleas having been overruled and said demurrers to said first and second replications to said eighth plea having been sustained, and a rule having been entered herein requiring said plaintiff to reply to said fourth and fifth pleas by the fourth Monday of June of said May term and to com-
103 plete the joining of issues or to elect to abide his said demurrers and replications, come now again this day said plaintiff, by Henry C. Whitney, Esq., his attorney, and said defendant Durant, by Charles H. Lawrence, Esq., his attorney, and said plaintiff elects to abide his several demurrers to said fourth and fifth pleas and each of them and to abide his first and second replications to said eighth plea and each of them; and all and singular the premises being seen and by the court now here fully understood, and it appearing to the court that said fourth and fifth pleas and each of them of said defendant Durant to said plaintiff's declaration are good and sufficient in law to bar said plaintiff from having and maintaining his aforesaid action against said defendant, therefore it is considered by the court that the plaintiff take nothing by his suit, and that the defendant William F. Durant do go thereof without day.

And it is further considered that the defendant William F. Durant do recover against the plaintiff his costs and charges by him about his defense in this behalf expended, to be taxed, and that the said defendant have execution therefor, said execution to be stayed by agreement of parties for six months from this date.

104 Afterwards, to wit, on the fourteenth day of December, 1887, there was filed in said clerk's office a bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Henry J. Rogers and William M. Van Nortwick, are held and firmly bound unto William F. Durant in the full and just sum of five hundred dollars, to be paid to the said William F. Durant, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at a term of the circuit court of the United States within and for the northern district of Illinois, in a suit depending in said court between Henry J. Rogers, plaintiff, and William F. Durant, impleaded with James W. Davis *et als.*, a judgment was

rendered against the said Henry J. Rogers for costs of suit, and the said Henry J. Rogers having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the
105 said William F. Durant, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Henry J. Rogers shall prosecute his suit to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY J. ROGERS. [SEAL.]
WM. M. VAN NORTWICK. [SEAL.]

Approved by—
H. W. BLODGETT, *Judge.*

Endorsed: Filed Dec. 14, 1887. Wm. H. Bradley, clerk.

106 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Henry J. Rogers is the plaintiff and William F. Durant, impleaded with James W. Davis *et al.*, is the defendant, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-first day of December, 1887.

WM. H. BRADLEY, *Clerk.*

107 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between Henry J. Rogers, plaintiff, and William F. Durant, impleaded with James W. Davis *et al.*, defendant-, in an action of assumpsit, a a manifest error hath happened, to the great damage of the said Henry J. Rogers, plaintiff, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf you are hereby commanded, if judgment be given therein, that then,

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1888, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixteenth day of November, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 112th year.

WM. H. BRADLEY,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

[Endorsed:] Supreme Court of the United States. Henry J. Rogers, plaintiff in error, *vs.* Wm. F. Durant, impleaded with James W. Davis *et al.*, defendant- in error. Writ of error. Copy deposited for the defendant- in error in the clerk's office U. S., northern district of Illinois.

108 UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss:*

To William F. Durant, Esquire, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1888, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Henry J. Rogers is plaintiff in error and William F. Durant, impleaded with James W. Davis and others, are defendants in error, to show cause, if any there be, why the errors mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the United States, this fourteenth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

H. W. BLODGETT, *Judge.*

109 [Endorsed:] Supreme Court of the United States. Henry J. Rogers, *vs.* William F. Durant, impleaded, &c. Citation to October term, A. D. 18—.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Henry C. Whitney, being first duly sworn, on oath saith that on the fifth day of January, A. D. 1888, affiant delivered a copy of the within citation to Chas. H. Lawrence, one of the attorneys of record in the within-entitled case, at the office of Cook & Lawrence, att'ys in said case, and affiant was at the same time there informed by said Lawrence that Wm. F. Durant, the aforesaid defendant, was absent from Chicago and was somewhere in the Southern States and would not return till next April.

HENRY C. WHITNEY.

Subscribed and sworn to before me this 5th day of April, A. D. 1888.

WM. H. BRADLEY, *Clerk.*

110 *Assignment of Errors.*

1. Court erred in overruling the demurrer of the plaintiff to the third, fourth, and fifth pleas of the defendant William F. Durant on April 20th, 1885.

2. Court erred in overruling the demurrer of the plaintiff to the fourth and fifth pleas of the defendant William F. Durant on March 1st, 1886.

3. Court erred in sustaining the defendant's, Wm. F. Durant's, demurrer to the first and second replications of plaintiff to the eighth plea of the defendant William F. Durant on March 1st, 1886.

4. Court erred in overruling plaintiff's demurrer to defendant William F. Durant's fourth and fifth pleas on June 30th, 1886.

5. Court erred in sustaining the defendant William F. Durant's demurrer to plaintiff's first and second replications to defendant William F. Durant's eighth plea on June 30th, 1886.

6. Court erred in rendering judgment in favor of the defendant William F. Durant and against the plaintiff upon the fourth and fifth pleas of the defendant William F. Durant.

7. Court erred in ordering a nonsuit against the plaintiff by reason of the matters set forth in the fourth and fifth pleas of the defendant William F. Durant.

8. Court erred in rendering a judgment of nonsuit against the plaintiff upon the pleadings in the case.

9. Court erred in ordering and directing a nonsuit against said plaintiff.

10. Court erred in rendering a judgment against plaintiff
111 and in favor of the defendant William F. Durant on the pleadings in the case.

11. Court erred in rendering judgment in favor of defendant William F. Durant and against the plaintiff in this case.

12. Court erred in rendering judgment against the plaintiff for costs in this cause.

13. Court erred in not submitting the issues formed upon the first, second, sixth, and seventh pleas of the defendant William F. Durant to the consideration and verdict of a jury.

HENRY C. WHITNEY,
Attorney for Plaintiff, Henry J. Rogers.

January 21st, 1888.

Endorsed on cover: N. Illinois C. C. U. S. No. 318. Henry J. Rogers, plaintiff in error, *vs.* William F. Durant. Filed January 23, 1888.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 318.

HENRY J. ROGERS,
Plaintiff in Error,
vs.
WILLIAM F. DURANT,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

DAVID J. WILE and
SHEDD & UNDERWOOD,
ATTORNEYS FOR PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 318.

HENRY J. ROGERS,
Plaintiff in Error,
vs.
WILLIAM F. DURANT,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This writ of error brings to this court for review rulings of the Circuit Court for the Northern district of Illinois upon certain questions of pleading in that court. The questions raised are as follows, reciting the proceedings in order:

Rec., p. 1. Trans., p. 1. Suit was begun in that court on January 26th, 1884, by the plaintiff in error against defendant in error, impleaded with James W. Davis, Mordecai B. Sprague, William Ruth, Timothy P. Richards, James H. Gessner and Henry C. Crane, trustee of Wilhelmina Davis Train, surviving partners of the late firm of James W. Davis & Associates, upon twenty separate instruments in writing, providing for the payment of money, and executed or accepted by James W. Davis & Associates, bearing various dates between April 12, 1869, and February 12, 1870, and maturing at times between the dates last named. The defendant in error alone was

served with process and appeared. The form of
Trans., pp. 2–8. the action was assumpsit, and the original declaration the ordinary money counts. To this, defendant in error filed eight pleas, as follows:

Rec., p. 19. 1st. The general issue, non-assumpsit, verified.

Trans., p. 10. 2d. Denial of joint liability, verified.

3d. That the cause of action did not accrue within five years before the commencement of the suit.

Rec., p. 22; Trans., p. 20. 4th. That the action is founded upon bills of exchange, and did not accrue within five years; but accrued, if at all, after February 10, 1869, and prior to April 4, 1872.

5th. That the action is founded upon contracts executed outside the State of Illinois, and did not accrue within five years.

6th and 7th. Payment.

Rec., p. 25. Trans., p. 12. 8th. A plea in the nature of a plea of *res adjudicata*, alleging at great length the existence of two firms known respectively as Davis, Sprague & Co., and James W. Davis & Associates; that defendant in error was interested in the former firm, but was not a partner nor interested in the business of the latter firm; that a suit was brought on September 26, 1870, in the Supreme court of the city,
Rec., pp. 26-31. county and State of New York, between the mem-
Trans., 13-15. bers of the two firms mentioned, the trustees for the building of the Union Pacific Railroad, and the wife of Jas. W. Davis, for the purpose of adjusting the accounts between said firms, and of adjudicating all questions of liability of the members of the firm of Davis, Sprague & Co. to the creditors of James W. Davis & Associates; that said cause was referred to a sole referee to hear and determine, and to state an account of all claims between the parties to said suit, or in favor of creditors of said two firms; that after the appointment of a receiver for both firms, and

certain other proceedings, to wit: On November 11, 1870, an order was entered requiring all creditors of either or both of said firms to present their claims with proofs in support thereof to said referee, on pain of exclusion from participating in the funds which should come to the hands of the receiver, and directing that said referee hear, determine and report upon the questions of ownership, validity and amount of all claims submitted to him; that in pursuance of said order plaintiff in error filed his claim upon the same causes of action involved in this suit with said referee, and introduced testimony in support of the same; that it was tried before said referee on the hearing touching said claims of plaintiff in error whether there were two distinct firms known as Davis, Sprague & Co., and James W. Davis & Associates, what persons composed said firms, and to what extent said firms and their members were liable on the claims of plaintiff in error; that said referee found and reported that the firm of Davis, Sprague & Co., including defendant in error, was not liable on the claims filed by plaintiff in error with said referee; that a final decree was entered on June 23, 1873, by said Supreme court of the city, county and State of New York,

Rec., pp. 32–40. confirming said report, and finding *inter alia*, that

Trans., 15–19. the defendants in the lower court transacted business together as a special venture in furnishing ties, etc., on the line of the Union Pacific Rail-road at points eastward only of a point known as Elk Mountain; that James W. Davis and Jas. H. Gessner, under the name and style of "Jas. W. Davis & Associates," or of "James W. Davis, trustee," furnished ties, etc., along the line of said railroad, west of Elk Mountain; that all of the work done by defendants below was performed between November 20, 1867, and January 1, 1869.

This plea further avers that plaintiff in error

Rec., p. 41. might have appealed from said decree, so far as

Trans., p. 19. the same referred to the claims presented to said referee, but has acquiesced in said decree, and taken

a dividend upon his claims from the fund set apart for the creditors of James W. Davis & Associates; that said decree is in full force and effect, and plaintiff in error is estopped to insist that the causes of action involved in this suit are valid as against defendant in error as a member of the firm of James W. Davis & Associates.

Upon the first and second pleas plaintiff in error joined issue, and to the sixth and seventh pleas filed replications traversing the same, while he demurred to the remaining pleas.

Rec., pp. 42–44. Trans., 19, 20.

Thereafter additional counts were filed by plaintiff in error declaring specially upon all the instruments in controversy; upon eighteen of them as bills of exchange, and upon the remaining two as banker's checks.

The banker's checks are as follows, to wit:

"CHEYENNE, May 18, 1869.

Rogers & Co., Cheyenne.

Pay to the order of F. Haggerty, three hundred and eighty-eight $\frac{45}{100}$ dollars.

J W. DAVIS & ASSOCIATES.
Per C. CHRISTOPHER,
Cashier."

"CHEYENNE, May 17, 1869.

Rogers & Co., Cheyenne.

Pay to the order of T. C. Bush, ninety-nine $\frac{35}{100}$ dollars.

J. W. DAVIS & ASSOCIATES.
Per CHRISTOPHER,
Cashier."

To the amended declaration the original pleas were ordered to stand, and also the similiters, replications and demurrers of plaintiff in error to the original pleas excepting as to the eighth plea, to which leave to reply double was given.

Thereupon plaintiff in error filed three replications to the eighth plea, of which the first is *nul tiel record*, concluding with a verification; the second admits the allegations of said plea as to the bringing of the suit in New York., the referee's report and the judgment thereon; the order of November 11, 1870; the presentation of the claims; of plaintiff in error, and the finding of the referee on said claims; and adds that plaintiff in error was not notified to nor did appear in said New York suit until the issues as to the existence of two firms and the persons composing same had been made up and the proofs thereunder substantially completed; that he had no opportunity to participate nor did he participate in making up said issues or presenting proofs thereunder; that he was not a party to so much of the judgment as adjudicated on said issues, nor could appeal therefrom, and that he could offer proof only as to the ownership, amount and validity of said claims and is not further estopped. Concludes with a verification. The third replication alleges that defendant in error held himself out as a partner in the firm of James W. Davis & Associates, whereby plaintiff in error was induced to acquire said claims; concluding with a verification.

Rec. p. 94.
Trans., p. 41.
Rec., pp. 95–97
Trans., 42.
Rec., p. 18.
Trans., p. 43.

To the replications of plaintiff in error to the sixth and seventh pleas defendant in error filed similiters, and to the replications to the eighth plea, demurrers were filed, alleging that the first replication has no proper conclusion; that the second replication amounts to a plea of *nul tiel record*, and is not in proper form, and that it seeks by its averments to vary the record set up in the eighth plea; that the third replication is not a plea in confession and avoidance, and does not conclude to the country.

Upon the above pleadings the court sustained plaintiff's demurrer to the third plea, and overruled it as to the fourth and fifth pleas, and also sustained

Rec., 93.
Trans., 41.

defendant's demurrer to the first and second replications to the eighth plea, and overruled it as to the third replication.

(Rec., p. 99. Trans., p. 45. The defendant thereupon rejoined, traversing the third replication to the eighth plea. Plaintiff in error elected to abide by his demurrers to the fourth and fifth pleas and his first and second replications to the eighth plea, and defendant elected to abide his third plea; whereupon plaintiff's suit was dismissed, the court finding the fourth and fifth pleas sufficient to bar said plaintiff's claim.

Rec., p. 103 4. Trans., 45. Plaintiff in error alone appealed to this court.

The questions presented for decision are, then, whether the instruments described by plaintiff in error as bank checks, hereinbefore set forth, come within the term "bills of exchange," used in the statute of Illinois, quoted below, and are barred by the statute of limitations, set up in the fourth and fifth pleas; and whether the replications to the eighth plea properly answer that plea.

The sections of the statutes of Illinois in force at the dates of execution of these instruments, on the subject of "Limitations of Actions," here involved, are as follows:

"2 Laws 1849, 44, 5, Nov. § 1, P. 731, S. 752, *17*, WRITTEN EVIDENCE OF INDEBTEDNESS.—*Sixteen Years.*] All actions founded upon any promissory note, simple contract in writing, bond, judgment, or other evidence of indebtedness in writing, made, caused, or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter.

"*Ibid.*, § 2, 18; PROMISE NOT IN WRITING.—*Five years.*] All actions founded upon accounts, bills of exchange, orders, or upon promises not in writing, express or implied, made after the passage of this act, shall be commenced within five years next after the cause of action shall have accrued, and not thereafter.

Assignment of Errors.

The rulings of the trial court which will be urged as error, here, are as follows, with the numbers originally given the same in assigning error:

3. The court erred in sustaining demurrer of
Rec., 110, 111; the defendant in error, William F. Durant, to the
Trans., 48, 49. first and second replications of plaintiff to the eighth plea.

4. The court erred in overruling plaintiff's demurrer to the fourth and fifth pleas.

6. The court erred in rendering judgment in favor of the defendant in error, and against plaintiff in error, upon the fourth and fifth pleas of the defendant in error.

7. The court erred in ordering a nonsuit against the plaintiff in error by reason of the matters set forth in the fourth and fifth pleas of defendant in error.

8. The court erred in rendering a judgment of nonsuit against the plaintiff in error upon the pleadings in the case.

12. The court erred in rendering judgment against plaintiff in error, and in favor of defendant in error for costs in this case.

Brief and Argument.

I. A plea must answer fully all it professes to answer.

Gould, Pl., page 331.
Co. Litt., 303 a.
Chitty, Vol., 1, 523–6.

II. Bankers checks are not bills of exchange.

Merchants Bank v. *State Bank*, 10 Wall., 647.
In re Brown, 2 Story, 502.
Morrison v. *Bailey*, 5 O. St., 13.
Hawley v. *Jette*, 10 Oregon, 31.
Levy v. *Laclede Bank*, 18 Fed. Rep., 192.
Champion v. *Gordon*, 70 Penn. St., 474.
McDonald v. *Stohay*, 1 Mon., 388.

III. The Federal courts are not bound by the decisions of the State where a question of general commercial law arises.

Boyce v. *Tobb*, 18 Wall., 546.
Hough v. *Railway Co.*, 100 U. S., 213.
Williams v. *Suffolk Ins. Co.*, 13 Pet., 415.
Robinson v. *Comm. Ins. Co.*, 3 Sum., 220.
Oats v. *National Bank*, 100 U. S., 239; 2 Sum., 378.

And cases cited in

Bump on Federal Procedure, 420, Ed. of 1881.

IV. Banker's checks, not being bills of exchange, are properly classed as " other evidence of indebtedness in writing" under the staute, and are not barred until the expiration of sixteen years from their date.

Gross' Statutes of Illinois, Vol. 1, page 430, Chapter 66, Sects. 17–20.

V. The statute of limitations set up by the fifth plea was not in force when the cause of action arose and does not apply to it.

Gross' Statutes of Illinois, Vol. 1, page 430, Chapter 66, Sects. 15–20.

VI. A replication of *nul tiel record* to a plea of *res adjudicata*, properly concludes with a verification.

Gould on Pl., page 289, § 17.
Chitty Pl., Vol. I, § 557 & § 600.
Tidd's Practice, 9th Ed., Vol. II, 742.
Puterbaugh Pl. & Practice, Common Law, 393.

VII. The replication of *nul tiel record* to a plea of *res adjudicata* only goes to the existence of the record, and any matter of discharge must be specially replied.

Tidd Pr., Vol. 1, p. 650.
Chitty, Vol. 1, § 486.

VIII. When a judgment or decree is relied on as conclusive between parties in a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined.

Love v. *Truman*, 10 O. St., 45.
Cook v. *Barnby*, 45 Tex., 97.
Hammer v. *Pounds*, 57 Ala., 348.

IX. It is only matters involved in the issues made by the pleadings that are considered *res judicata*, and parol evidence is competent to show that a question which it appears by the record might have been litigated, was not in fact litigated in the former suit.

Duncan v. *Holcomb*, 26 Ind., 378.
Davis v. *Canfield*, 14 Barb. (S. C.), 611.
1 Greenl. Ev., § 528.

I.

A PLEA MUST ANSWER FULLY ALL THAT IT PROFESSES TO ANSWER.

This principle of pleading is elementary. If a plea in bar, purporting to be a complete answer to the count, upon its face fails to answer the whole, the plea is bad, the plaintiff's course is to demur, and there will be no discontinuance in so doing. The fourth plea of defendant, which sets up the five-year statute of limitations upon bills of exchange makes no defense to those two instruments in suit which are not bills of exchange. The plaintiff declares upon instruments of two sorts, checks and bills of exchange. Defendant pleads that all are bills of exchange, and barred by the statute of limitations on such instruments. If in fact checks are not bills of exchange, defendant's plea is bad, as answering less than it purports to answer, and plaintiff's demurrer to it should have been sustained.

II.

BANKERS' CHECKS ARE NOT BILLS OF EXCHANGE.

In the first case cited on this point, this court has held that "bank checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. * * * The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed, etc."

Merchants' Bank v. *State Bank*, 10 Wall., 647.

The declaration avers that these instruments are banker's checks, and drawn on Rogers & Co., bankers; they call for payment forthwith, and comply in all other respects with the definitions of checks above given.

Judge Story has discussed this question at some length, holding clearly that the distinction between the two classes of commercial

paper is unmistakable, and one desirable to retain rather than to obliterate.

In re Brown 2 Story 502.

He says:

"Checks are as well known now as bills of exchange, as a class "of distinct instruments in commercial negotiations; and he who "seeks to make them identical in all respects with bills of exchange, "may unintentionally be introducing an anomaly instead of sup- "pressing one."

Not only is this rule adopted, and followed by the federal courts, but also the courts of last resort in a number of the states have approved it, as appears from the cases cited, which might be added to extensively.

It is said that the Supreme court of Illinois has expressly decided that checks are bills of exchange.

Bickford v. *First National Bank*, 42 Ill., 243.

A careful examination of the language used by BREESE, J., shows that he practically agrees with Justice Story: "Bank checks," he says, "are substantially inland bills of exchange"; on the authority of Chancellor Kent, who is cited by Story, and of other less influential opinions. But "*nullum simile est idem*," as Story has carefully pointed out; similarity does not constitute identity, and the case cited does not controvert the position taken, that bankers' checks, however, closely resembling bills of exchange, do not come under that description.

III.

FEDERAL COURTS ARE NOT BOUND BY THE DECISIONS OF THE STATE WHERE A QUESTION OF GENERAL COMMERCIAL LAW ARISES.

When a federal court has decided for itself upon a question of a general nature, not based on a local statute or usage, or on any principle which has become a settled rule of property, that position

will not be abandoned, because the Supreme court of a state, whence the question comes, has held otherwise. This is especially true of matters belonging to universal commercial law. Suppose the Supreme court of Illinois were to hold that a promissory note is not entitled to days of grace, the commercial world, which had used promissory notes before the prairie sod of Illinois had felt the plow, would not be shaken in its views upon that point, nor would this court find it necessary to reverse itself merely for that reason. Equally true is it that the well recognized distinction between checks and bills of exchange, made by this court, and by many another of respectable authority, is not to be lightly cast aside at the wish of the Illinois court, even supposing that desire to have been clearly expressed. Numerous cases have been cited upon this point, and many more will suggest themselves to the court.

IV.

BANKERS' CHECKS, NOT BEING BILLS OF EXCHANGE, ARE PROPERLY CLASSED AS "OTHER EVIDENCE OF INDEBTEDNESS IN WRITING" UNDER THE STATUTE, AND ARE BARRED ONLY AT THE EXPIRATION OF SIXTEEN YEARS FROM THEIR DATE.

In the statute, actions founded upon any "promissory note, sim-
"ple contract in writing, bond, judgment or other evidence of indebted-
"ness in writing" are grouped together, and distinguished from actions founded on "accounts, bills of exchange, orders, or upon "promises not in writing, express or implied." The general distinction between the two groups clearly is that the former contains obligations of a higher class than the latter, and as checks are specifically named in neither, whether they belong to the one or the other, may properly be determined by the degree of obligation imposed by them on their maker.

Certainly, giving a check on a banker, over one's signature, thus

asserting the presence in the banker's hands of money sufficient to satisfy it, creates an obligation which may well be longer lived than that of an open, unadjusted account; of an "order," perhaps entitling the bearer to credit for trade at a country grocery, perhaps calling for the delivery of a horse or a house, a carload of produce or a paper of pins—an off-hand instrument, designed for immediate use and of temporary service; or of a promise not in writing. The only other species of instruments included in this group is bills of exchange, and this court has said that checks are not bills of exchange.

Why, then, hesitate to say that on a par with promissory notes, and simple contracts in writing, checks should be classed as "other "evidence of indebtedness in writing," not otherwise distinguished, and as entitled to the longer lease of life? This is the group to which, by natural affinity and by direct description, if not named, checks belong.

It will be said that checks are "orders," and, in a general sense, this is true. A check is an order addressed to a bank or banker, directing the payment of money in accordance with its terms. But, in ordinary usage, in the customary mode of employing language, which is the first guide to the interpretation of a statute, "orders" are never made to include "checks," which are invariably considered and spoken of as a class by themselves. "Orders," as popularly understood, are instruments of a less fixed character than checks, imposing a less serious obligation upon the maker, couched in any form of language, not merely transferable, and providing for the delivery of anything or the performance of any service. Outside of and apart from them, checks are placed by themselves.

V.

THE STATUTE OF LIMITATIONS SET UP BY THE FIFTH PLEA WAS NOT IN FORCE WHEN THE CAUSE OF ACTION AROSE, AND DOES NOT APPLY TO IT.

In Gross' Statutes of Limitations, Chap. 66, page 430, as Sect. 15, the following provision appears:

"Laws 1849, 132, 10 Feb., § 1, p. 730, S. 752. [PERSONAL "ACTIONS—FIVE YEARS]: All actions of trespass, detainer, trover "and replevin; all actions founded on any promissory note, bill of "exchange, book account or simple contract; all actions founded on "any promissory note, bond, judgment, contract or indebtedness "executed, rendered, entered into, or accrued beyond the limits "of this state, and all actions on the case shall be commenced "within five years next after such recovery, or the cause of such "action shall have accrued, and not after. All parts of acts incon- "sistent with the provisions of this act are hereby repealed."

Following this provision, as sections 17, 18 and 20 of the same chapter, are the following:

"2 Laws 1849, 44, 5 Nov., § 1, p. 731, S. 752, *17*. [WRITTEN "EVIDENCE OF INDEBTEDNESS.—SIXTEEN YEARS]: All actions "founded upon any promissory note, simple contract in writing, "bond, judgment, or other evidence of indebtedness in writing, "made, caused, or entered into after the passage of this act, shall "be commenced within sixteen years after the cause of action "accrued, and not thereafter."

"*Ibid*, § 2, [18. PROMISE NOT IN WRITING.—FIVE YEARS]: "All actions founded upon accounts, bills of exchange, orders, or "upon promises not in writing, express or implied, made after the "passage of this act, shall be commenced within five years next "after the cause of action shall have accrued, and not thereafter."

"*Ibid.*, § 4. [FORMER ACTS REPEALED]: So much of chap-
"ter 66 of the said revised statutes, entitled 'Limitations,' as is in
"conflict with this act is hereby repealed; and so much of the said
"act amendatory thereof, passed February 10, 1049, as is inconsist-
"ent with this act, is hereby repealed; *Provided always*, that the
"several acts aforesaid shall hereafter, in all actions instituted
"upon causes of action arising during the period in which said laws
"were respectively in force, be the rule of limitations and adjudica-
"tion in all such cases, and that neither this act nor said amenda-
"tory act shall be so construed as to limit or affect the right of
"action upon any matter of indebtedness or cause of action exist-
"ing or accruing before their several enactment."

At the time when the instruments in question were executed all of the above statutes had been enacted. The act of November 5, 1849, was in full force, and also so much of the act of February 10, 1849, as is not inconsistent with the later act. Whether, under these two acts, actions on promissory notes, bonds, judgments, contracts and indebtedness executed, etc., beyond the limits of Illinois are barred in five years or in sixteen years after the cause of action accrued, must be determined by this language. The act of November 5th includes in its terms all promissory notes, simple contracts in writing, bonds, judgments, or other evidence of indebtedness in writing, without distinction as to where or how made, caused or entered into; the act of February 10th includes so many of those contracts, etc., as were executed without Illinois, and provides for them a period of limitation different from that fixed by the later act. If the greater includes the less, the terms of the act of February 10th upon such causes of action as have been referred to are inconsistent with those of the later act, and the former provision is repealed. The mere statement of the position taken here by defendant in error, in view of the terms of the statute, is its own answer. The fifth plea, then, does not set up a valid ground of defense, and the demurrer to that plea should have been sustained.

VI.

A REPLICATION OF NUL TIEL RECORD TO A PLEA SETTING UP A JUDGMENT IN BAR OF AN ACTION PROPERLY CONCLUDES WITH A VERIFICATION.

The demurrer to the first replication to the eighth plea is both general and special. The replication demurred to is a simple traverse, demurrable only for matters of form, if at all. The special matter set up is that the replication has no proper conclusion.

The replication is as follows:

"And the plaintiff as to the plea of the defendant by him eighthly "above pleaded says *precludi non*, because he says that there is not "any record of the supposed proceeding in the said eighth plea men- "tioned remaining in said Supreme Court of New York, in manner "and form as the said defendant both above in his said plea alleged, "and this the said plaintiff is ready to verify, etc., wherefore he "prays judgment, etc."

Gould on Pleading, page 289, Sec. 17, says, citing cases:

"The trial by record takes place whenever a record is directly "put in issue, by the plea of *nul tiel record*. This plea, (the only "one by which a record can be *directly* put in issue), concludes with "a verification; and the issue is then closed by the adverse party's "reaffirming the existence of the record, and praying that it may "be inspected by the court."

This is the rule laid down, also by Chitty, Tidd and Puterbaugh, and seems to have both age and weight of authority, in its favor. And as the replication is the general issue, unless the form is defective, no course remains to the defendant, save to accept the issue tendered, and his demurrer should have been overruled by the trial court.

VII.

THE REPLICATION OF NUL TIEL RECORD GOES ONLY TO THE EXISTENCE OF THE RECORD, AND ANY MATTER OF DISCHARGE MUST BE SPECIALLY REPLIED.

This position is fully sustained by the authorities cited. If, therefore, the judgment pleaded was actually rendered and is still in force, even though a perfect defense exist to the same, which explains or contradicts some of the allegations of the eighth plea, intended to show that the judgment recited is binding as an estoppel upon the plaintiff in error, unless some other plea than *nul tiel record* be permitted, the defense cannot be shown. In the case at bar, while it is not disputed that a judgment was rendered at the time and by the court specified in the eighth plea of defendant in error, which judgment contains the language quoted in that plea and is in full effect, still it is urged that the plaintiff in error was a party to that proceeding only *sub modo*, coming into said cause under an order permitting proof of the ownership, validity and amount of his claim, and of nothing else; that to the extent of determining those matters, and no farther, it is an adjudication binding upon the plaintiff; that he could have appealed from the judgment as to those three points, and nothing else. All these statements, if true, compose a valid defense to the estoppel sought to be asserted, but they do not in anywise contradict the existence of the judgment, nor of its language and contracts. If no replication but *nul tiel record* is allowed to the eighth plea, none of these matters can be shown. The single burden of satisfying the court that the record exists rests on the defendant, and when that light burden has been assumed the plaintiff is out of court, helpless, though he has never had his day in court.

It cannot be that a mere claimant against a fund in court, who appears under a restrictive order permitting his proofs to be placed on

file for participation in the fund when released, is to be bound by all the findings of the court between the principal litigants. If that were to be the result, it would be most unsafe ever to file claims with the receiver appointed on the application of one of a bankrupt or discordant firm of partners. Should the court find that as between themselves they were not partners, the millionaire being exempt from liability by secret agreement with his insolvent partner, and should the creditors by reason of filing their claims be bound by the finding of that court to pursue only the insolvent, though always before ignorant of the actual state of things, and misled by the pretense of partnership, the case would offer a parallel to this one, if no replication save *nul tiel record* is tolerated.

It is confidently believed that this court will not lend itself to such a denial of justice, but will permit the plaintiff in error to maintain his replication, and to offer evidence under it against the unrighteous estoppel sought to be accomplished.

To constitute an estoppel it must appear that upon the question of fact presented the party has had a day in court, in which he either did or ought to have put it in issue.

Hooker v. *Hubbard*, 102 Mass., 345.

It appears from the record that under the order of November 11, 1870, the plaintiff in error appeared in court; that the only issue tendered him was that of the amount, validity and ownership of his claim, all of which werefound as he averred them; that prior to his appearance elaborate pleadings had been made up and an extensive hearing had between the parties of record, in which he was allowed no share, and upon which an extensive decree was rendered, while the only portion of said decree entitled to create an estoppel against plaintiff in error under the above rule is as follows:

Rec., p. 39. Trans., p. 18.

"It is further adjudged that all persons, parties and "corporations named in clauses one and two of the "report of the referee herein of November 16, "1871, having appeared, filed their claims and

"proved the same before the referee, and the same having been "adjusted and reported by the said decree, shall be considered as "adjudicated upon as to the amounts claimed by them respectively."

To the extent of this finding plaintiff in error was before the court, and as to nothing else could he appeal.

VIII.

WHEN A JUDGMENT OR DECREE IS RELIED ON AS CONCLUSIVE BETWEEN PARTIES IN A SUBSEQUENT SUIT, IT MUST APPEAR BY THE RECORD OF THE FORMER SUIT, THAT THE PARTICULAR CONTROVERSY SOUGHT TO BE PRECLUDED WAS THEREIN NECESSARILY TRIED AND DETERMINED.

This is the very essence of an estoppel of record, that the same parties shall be concerned, and the same matter in question which has once been determined between those parties. It does not appear from the order of November 11, 1870, by virtue of which alone the plaintiff in error was a party to the New York suit, that the issues between the principal parties in that suit, as to whether there were two partnerships or one, who composed the partnerships and what were the liabilities of each, were as to them necessarily tried and determined. It does appear by inference that nothing except the validity, ownership and amount of the claims was properly before the court concerning plaintiff in error, and parol proof is not admissible to show that the plaintiff in error was otherwise involved in the controversy of the New York suit than appears from the order of November 11, 1870.

"When the declaration states a special matter as the ground of "action, and issue is taken by the defendant upon the allegation, "parol proof is inadmissible to show that a different subject was lit-"igated upon the trial."

Campbell v. *Butts*, 3 Comst., 173.

The "special matter" involved in the introduction of plaintiff in error was whether he had a valid claim, and how large a claim, against the firm of James W. Davis & Associates, regardless of who might compose that firm. Whatever action might be taken upon the claim would give the claimant no personal judgment in that proceeding against any individual or firm. Only the liquidation of the claim as against the fund was sought or could be expected, and anything concerning the characteristics, origin or peculiarities of the two alleged firms whose identity is sought to be settled by this decree, as far as plaintiff in error is concerned, was entirely collateral to his enforcing a claim against the fund in court for distribution. But to be *res adjudicata*, it must be directly and not collaterally in issue.

Henry v. *Davis*, 13 W. Va., 251.

And the mere fact that collateral or incidental matters are laid before the court or given in evidence during the progress of a controversy, does not render them part of the cause, and legitimate subjects of decision which will make them *res adjudicata*.

Tams v. *Lewis*, 42 Pa. St., 411.

From these principles and decisions it must be evident that plaintiff in error has an answer to this plea of estoppel of which he is entitled to avail himself, and of which he cannot take advantage under the replication of *nul tiel record*. Unless the decisions cited heretofore are disregarded, he must needs be permitted to plead it specially, and it is this permission only which is sought by the plaintiff in error in appealing from the ruling on the demurrer to the second replication to the eighth plea, which should have been overruled and not sustained.

IX.

IT IS ONLY MATTERS INVOLVED IN THE ISSUES MADE BY THE PLEADINGS THAT ARE CONSIDERED RES ADJUDICATA, AND PAROL EVIDENCE IS COMPETENT TO SHOW THAT A QUESTION WHICH, IT APPEARS BY THE RECORD, MIGHT HAVE BEEN LITIGATED, WAS NOT, IN FACT, LITIGATED IN THE FORMER SUIT.

The decisions cited under this head hold that not only is the party who alleges an estoppel by matter of record, confined to the issues actually involved in the pleadings, but that even as to the matters which were thereby in condition to be contested and determined, he may show by parol that certain ones were not actually under consideration. Even though the issue tendered to plaintiff in error had been broader than was the case, it is his privilege to show that any portion of the issue was not actually litigated nor determined. As to plaintiff in error, no part of all the proceedings recited in the decree except that bearing on the amount, validity and ownership of his claim, were taken, and this he is entitled to show by parol. But under the replication of *nul tiel record*, this is denied him, and for this reason, the replication on file which sets up the facts should be allowed to stand.

If this court agrees with plaintiff in error upon the question of limitation of suits on bank checks, under the Illinois statute, in which decision it is abundantly justified, it is thought that the question of pleading will not be allowed to prevent him from availing himself of all legal and equitable answers to the estoppel urged.

Respectfully submitted.

DAVID J. WILE and
SHEDD & UNDERWOOD.

JAMES H. McKENNEY, CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 318.

HENRY J. ROGERS,
Plaintiff in Error,
vs.
WILLIAM F. DURANT, IMPLEADED ETC.,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

CHARLES H. LAWRENCE,
COUNSEL FOR DEFENDANT IN ERROR.

IN THE

Supreme Court of the United States.

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Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

This is a suit in assumpsit, brought by Henry J. Rogers against Wm. F. Durant and others as surviving partners of the firm of Jas. W. Davis and Associates. Durant alone was served with process. The suit was brought January 26, 1884, and judgment was rendered against the plaintiff and in favor of Durant, for costs, June 30, 1886, upon issues of law. (P. R., p. 45.)

The declaration, as first filed, consisted only of the common counts, attached to which were copies of twenty bills of exchange. (P. R., p. 2.) Defendant filed eight pleas, on some of which issues of fact were joined and others were demurred to. (P. R., pp. 10–20.)

November 9, 1885, plaintiff, by leave of court, filed an amended declaration, containing twenty special counts—one upon each of the drafts mentioned,—and the common counts, and it was ordered that the pleadings as already presented should stand to the amended declaration, with added leave to reply double to the eighth plea.

One of the drafts (No. 20) bears date February 21, 1870, is a sight draft alleged to have been accepted on the day of its date; all the others matured and are alleged to have come to plaintiff's hands prior to the year 1870.

Several issues were made up by the pleadings, a synopsis of which is as follows:

1ST ISSUE. *a.* Declaration (P. R., p. 22.)

b. Plea of general issue verified by affidavit. This under the Illinois statute, puts in issue the execution of the paper, so that it is not *prima facie* evidence against the defendant.

c. *Similiter.*

2D ISSUE. *a.* Declaration.

b. Plea averring that defendant Durant was not a member of the firm of Jas. W. Davis and Associates.

c. *Similiter.*

3D ISSUE. *a.* Declaration.

b. Plea averring that the causes of action declared on did not accrue within five years before suit. (P. R., p. 11.)

c. Demurrer to plea. (Demurrer sustained, P. R., p. 43.)

4TH ISSUE. *a.* Declaration.

b. Plea that each and all of the causes of action declared on are founded upon bills of exchange and that no cause of action accrued on them within five years before suit, but that they accrued, if at all, after February 10, 1849, and prior to April 4, 1872. (P. R., p. 11.)

c. Demurrer to plea. (Demurrer overruled; P. R., p. 43.)

d. Judgment in favor of defendant on this issue. (P. R., p. 45.)

5TH ISSUE. *a.* Declaration.

b. Plea that each and all of the supposed causes of action are founded on contracts entered into beyond the limits of the State of Illinois, and that none of them accrued to plaintiff within five years before suit, but accrued, if at all, after February 10, 1849, and prior to April 4, 1872. (P. R., p. 11.)

c. Demurrer to plea. (Demurrer overruled; P. R., p. 43.)

d. Judgment in favor of defendant on this issue. (P. R., p. 45.)

6TH ISSUE. *a.* Declaration.

b. Plea of payment.

c. Traverse.

d. *Similiter.*

7TH ISSUE. *a.* Declaration.

b. Plea that on April 3, 1869, Jas. W. Davis and Associates deposited with plaintiff for collection drafts for $125,-

000 for collection, out of the proceeds of which it was agreed plaintiff should pay the drafts and acceptances of Jas. W. Davis and Associates, then outstanding and future ones to the amount of said deposit, and that the drafts declared on are among those embraced in such agreement and that the drafts for $125,000 have been paid, whereby the causes of action declared on are paid.

c. Traverse.

d. *Similiter.*

8TH ISSUE. *a.* Declaration.

b. Plea of former adjudication in the State of New York, in which it was decreed that defendant Durant was a member of the firm of Davis, Sprague & Co., but was not a member of Jas. W. Davis and Associates, and in which proceeding the court divided certain assets into two funds, one of which was set apart for the creditors of Davis, Sprague & Co., and the other for the creditors of Jas. W. Davis and Associates; that plaintiff here had a right to appeal from the decree in that suit so far as it affected him, but that he has acquiesced in said decree and taken a dividend upon the claims here sued on from the fund in the New York court, which was adjudged to the creditors of Jas. W. Davis and

Associates. (*Profert.* of record, etc.)

c. Demurrer to pleas (afterward withdrawn.)

d. Two replications to the eighth plea and demurrer thereto, filed December 2, 1885, on which it would seem demurrer was confessed, as later in the records are found (P. R., p. 41) three replications to the eighth plea, as folfollows:

e. Ist replication that there is not any record of the supposed proceeding in in the Supreme court of New York, concluding with verification.

f. Demurrer to replication. (Demurrer sustained; P. R., p. 43.)

g. IId replication to eighth plea averring that though the proceeding was had as stated in the eighth plea the proofs therein were substantially completed before plaintiff herein was notified to appear, or before he became a party to said suit, and that he was not a party to so much of said judgment as determined the *personnel* of the partnership, and that he could not appeal from that part of the judgment, and the only proof he was allowed to make was as to ownership, validity and amount of claim.

h. Demurrer to replication. (Demurrer sustained. P. R., p. 43.)

i. IIId. Replication to eighth plea avers that before the plaintiff acquired any of

the obligations sued on Durant held himself out to plaintiff as a partner in Jas. W. Davis and Associates, and never renounced such holding out till after plaintiff had acquired all of said claims, and that by such holding out plaintiff was induced to acquire them.

j. Rejoinder, traversing replication.

Judgment was rendered in favor of defendant on fourth and fifth pleas, the plaintiff having elected to abide his demurrers to said pleas. (P. R., p. 45.)

The court also sustained defendant's demurrers to the first and second replications to the eighth plea, and plaintiff abided by his replications. (P. R., p. 45.)

Brief.

I.

THE JUDGMENT OF THE CIRCUIT COURT IN OVERRULING THE DEMURRER TO THE FOURTH PLEA WAS IN ACCORDANCE WITH LAW.

Law of Illinois, regarding limitations, passed Feby. 10, 1849. § 1.

Law of Illinois, regarding limitations, passed Nov. 5. 1849. § 2.

Law of Illinois, repealing act, passed March 31, 1874. § 1, ¶¶ 119 and 138, and § 6 same act.

Bickford v. *First Nat. Bank*, 42 Ill., 242.

II.

THE JUDGMENT OF THE CIRCUIT COURT IN OVERRULING THE DEMURRER TO THE FIFTH PLEA, WAS IN ACCORDANCE WITH LAW.

Law of Illinois, regarding limitations, passed Feby. 10, 1849. § 1.

Law of Illinois, repealing act, *same* as under point 1.

III.

THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRER TO THE FIRST REPLICATION TO THE EIGHTH PLEA.

Gould on Pleading, Chap. III, Sec. 1.

Stephens on Pleading, Tyler's 3d Am. Ed., 229.

IV.

THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRER TO THE SECOND REPLICATION TO THE EIGHTH PLEA.

Stephens on Pleading, Tyler's 3d Am. Ed., 236.

Davis v. *Brown*, 94 U. S., 428.

Cromwell v. *County of Sac*, 94 U. S., 352.

Miles v. *Caldwell*, 2 Wallace, 35.

V.

THE JUDGMENT OF THE CIRCUIT COURT WAS IN ACCORDANCE WITH LAW.

ARGUMENT.

I.

THE JUDGMENT OF THE CIRCUIT COURT IN OVERRULING THE DEMURRER TO THE FOURTH PLEA WAS IN ACCORDANCE WITH LAW.

Two of the twenty pieces of paper sued on (Nos. 3 and 4, for the respective amounts of $388.45 and $499.35), P. R., p. 5 are described in the declaration (P. R. pp. 23, 24) as bankers' checks; the rest are described as bills of exchange. The verbiage is immaterial since a check on a bank is still a draft or bill of exchange.

Bickford v. *First Nat. Bank*, 42 Ill., 242.

The only argument necessary upon this point is to cite the Illinois statutes.

The act of the Illinois legislature, passed February 10, 1849, most readily found in Gross' Ill. Statutes, ed. 1868 or 1869, fixes the period of limitation on bills of exchange at five years. An act amendatory to the chapter on limitations, passed November 5, 1849, fixes the same period.

An act revising the law as to limitations was passed April 4, 1872, fixing a different period and which forms part of the revised statutes of Illinois of 1874, and in the general repealing act of 1874 the two statutes cited are expressly repealed. Rev. Stat. Ills., 1874, Chap. 131; Statutes, § 5, ¶¶. 119 and 138.

By section 6, same chapter, it is provided that "when "any limitation law has been revised by this or the twen- "ty-seventh general assembly" (the one in session April

4, 1872), "and the former limitation law repealed, such "repeal shall not be construed so as to stop the running "of any statute, but the time shall be construed as if such "repeal had not been made."

II.

THE JUDGMENT OF THE CIRCUIT COURT IN OVERRULING THE DEMURRER TO THE FIFTH PLEA WAS IN ACCORDANCE WITH LAW.

All of the drafts are drawn and are made payable in Cheyenne, Dakota.

The statute of Illinois, passed February 10, 1849, (Gross' Ill. Stat., Ed. 1868, page 429—Chap. Limitations) in section 1 provides *inter alia* that * * * "all "actions founded on any promissory note, bond, judg- "ment, contract or indebtedness executed, rendered, "entered into or accrued, beyond the limits of this state" * * * "shall be commenced within five years next "after such recovery, or the cause of such action shall "have accrued, and not after."

This law was revised in 1872, and repealed in 1874, as stated in point I.

III.

THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRER TO THE FIRST REPLICATION TO THE EIGHTH PLEA.

The eighth plea sets up a proceeding in the Supreme court of the State of New York, brought by Durant and others, in equity, for an adjudication of all questions of liability of the members of Davis, Sprague & Co. in reference to the firm of Jas. W. Davis & Associates,

or the latter's creditors (P. R., pp. 12--19) in which, amongst other questions, it was in issue whether or not Durant was a member of the firm of Jas. W. Davis & Associates and wherein it was adjudged that he was not; that Rogers was a party and privy to such proceeding, and availed himself of the decree and acquiesced therein, although he had a right of appeal therefrom; that in said cause a certain fund was found to belong to a firm called Davis, Sprague & Co., and another to belong to Jas. W. Davis & Associates, and ordered to be distributed to the respective intervening creditors of each firm; that the claims here sued on were allowed in Rogers' favor as debts of Jas. W. Davis & Associates, of which Durant was not a member, and that Rogers took his dividend upon these claims from the fund set apart for the creditors of Jas. W. Davis & Associates.

The plea is admitted to be good upon its face. The first replication (P. R., p. 41) avers that there is no such record, and concludes as follows: "And this the said "plaintiff is ready to verify, etc., wherefore he prays "judgment, etc." The replication is specially demurred to for want of a proper conclusion.

Gould, in speaking of the general rules of pleading (Chapter 3, § 1), states that "there are two indispensable requisites to all good pleading; (1), that the *matter* "pleaded (*i. e.*, the *facts* alleged) be sufficient in law to "avail the party who pleads it; and (2), that it be de- "duced and alleged according to the forms of law. And "if either of these requisites be omitted, the pleading is ill, "for all pleading is required to be sufficient, not only in "substance, but in *form* also; by which latter term, we "are here to understand those technical or artificial modes "of introducing and detailing the subject-matter pleaded

"which have been established by usage, and which can-
"not be dispensed with without impairing that *certainty*,
"*regularity* and *uniformity* which are essential in all
"judicial proceedings."

While a pleading which is a traverse, instead of a confession and avoidance of the antecedent pleading to which it responds, usually concludes to the country, such is not the case with the plea of *nul tiel record*. The proper form of replication to a plea of former adjudication is given in Stephens on Pleading, Tyler's 3d Am. Ed., 229, and the conclusion is as follows: "And this "the said A. B. is ready to verify when, where and in "such manner as the court here shall order, direct or ap-"point."

Of course the demurrer is technical, but under the authorities cited, I think there can be no question that it lies to the replication. Where an issue of fact is tendered by conclusion to the country, the party can refuse to go to trial if he choose until *similiter* is added, though the want of it may be cured by verdict if no objection is made.

IV.

THE CIRCUIT COURT PROPERLY SUSTAINED THE DEMURRER TO THE SECOND REPLICATION TO THE EIGHTH PLEA.

The substance of the plea has already been stated.

The second replication (P. R., 41 and 42) avers that although the issues in the New York suit existed and were determined as stated in the eighth plea, and that Rogers having been served with the notice to creditors to present their claims did present the claims involved in this cause, and that they were adjudged valid as against

Jas. W. Davis and Associates, and as not valid against Davis, Sprague & Co. (of which Durant was a member), or against any members of Davis, Sprague & Co.; yet the fact was that the issues as to who composed the firms were all made up, and the proofs on these issues substantially completed before Rogers was notified to appear or became a party to that suit, and that he had no opportunity to and did not participate in adducing proofs *pro* or *con* as to said issue, and that he was no party to so much of said judgment as adjudicated said matter, and could not appeal from that part of it, and that the only proof he was allowed to offer was as to the ownership, amount and validity of his claims, and is not bound or estopped by anything further; "and this he is ready "to verify. Wherefore, inasmuch as the said defendant, "William F. Durant, hath not answered the said com- "plaint of the plaintiff as to the breach and non-per- "formance of the said premises in the said declaration "mentioned, he, the said plaintiff, prays judgment."

The plea is demurred to (P. R., 41) generally and specially (*a*) as amounting to *nul tiel record*, but not in proper form therefor, and (*b*) as seeking to vary the record set up in the eighth plea.

a. The replication admits in express and affirmative terms the allegations of the plea that the New York suit was brought for the purposes stated in the plea, to wit: to procure an adjustment and settlement of matters between the firms of Davis, Sprague & Co. and Jas. W. Davis and Associates, and for an adjudication of all questions of liability of Durant and the other members of Davis, Sprague & Co. in reference to the firm of Jas. W. Davis and Associates *or its creditors*, and that it was in issue whether Durant was a member of Jas. W.

Davis and Associates, and it was adjudged he was not, and that an order entered requiring all persons having claims against either or both firms to present the same with proofs in support of the validity thereof was served upon Rogers, and that in response thereto he presented the claims here sued on, and offered proof of their ownership, *validity* and amount, and that it was found that they were not valid claims against any member of Davis, Sprague & Co.

Thus far the plea and replication coincide.

The plea avers (P. R., 14; Original Rec., 30) that on the hearing touching Rogers' claims the question of the membership of the two firms, and the question whether Durant was liable on the claims presented by Rogers were in issue and were tried, and that Rogers introduced testimony in support of his claims upon said issues; the plea also avers that Rogers might have appealed from the decree so far as the same respected his claims.

The replication is inconsistent with the plea only in the averments that the issues were made up and the proofs *substantially* completed before Rogers became a party; that he could not and did not participate in the proofs in reference thereto; that he was not a party to so much of said judgment as adjudicated them, and that he could not appeal therefrom, and the only proof he was allowed to make was as to ownership, amount and validity of his claims.

Now, it is admitted he did make proof as to the VALIDITY of his claims. He could not establish them as valid claims against either of the funds in court, unless he showed that the persons liable thereon were the proprietors of the fund in which he participated. In other words, if he was allowed—as he admits he was—to ad-

duce proofs as to the *validity* of his claims, the whole field was open to him, and legally the replication in that respect is in accord with the plea. Whether or not Rogers offered proofs is immaterial, provided he might have done so.

Davis v. *Brown*, 94 U. S., 428.
Cromwell v. *County of Sac*, 94 U. S., 352.

Also, whether Rogers had the right of appeal is immaterial, since litigation must stop somewhere.

It not being necessary that the party could have a right of appeal, the averments in that regard, both of the plea and the replication, are immaterial, and a traverse of an immaterial point is not good. The real substance of the plea lies in the issues made and determined, and the fact that Rogers took the benefit of the decree.

"A legatee who goes in before the master under a "decree against an executor *obtained by another party*, or "who makes the result of such accounting the basis of a "suit or decree for an account in his own behalf, will be "bound by the account taken in such first suit."

Newcomb v. *St. Peter's Church*, 2nd Sanford's Chancery Rep., 636.

The traverse, then, of the averments of the plea in regard to his right to offer proofs, or his offering them, are really immaterial, because, if the issues were made and determined, as is admitted by the replication, if he was notified to prove his claims, as is likewise admitted, and take his dividend, as is also admitted, the question as to whether he could offer proofs, or did offer them, or could appeal, or did appeal, are all immaterial, and do not present an answer to the plea.

Stephens on Pleading, Tyler's 3d Am. Ed., 236.

But all of these inconsistencies between the replication and the plea are as to matters of fact denied by the replication, but which are stated affirmatively in the plea as existing in the record. No new matter is set up by way of confession and avoidance. The replication therefore purports to be a traverse of the plea of a record; but the only proper traverse of a plea of a record is *nul tiel record*, the proper and necessary form of which has already been treated of. The demurrer to the replication, for want of form, was therefore properly sustained.

(*b.*) The replication is also demurred to as seeking to vary the record set up in the plea. The plea avers certain facts, and offers to prove them by the record.

While evidence *dehors*, the record may sometimes be admitted to explain it, or supply that which is not shown upon its face, or, while its existence may be denied, it is not competent to vary it.

Miles v. *Caldwell*, 2d Wallace, 35.

And what is not the subject of proof, cannot be pleaded as a fact.

V.

THE JUDGMENT OF THE CIRCUIT COURT WAS IN ACCORDANCE WITH LAW.

Other errors than those embraced in the propositions already considered, are assigned.

The first relates to a ruling on demurrers to pleas to the original declaration which was abandoned by plaintiff.

It is also alleged as error that no trial was had on the issues of fact joined on the first, second, sixth and seventh pleas. I do not know how to make any argument on these propositions.

It is also alleged that the court erred in rendering judgment of non-suit. As to this, it need only be said that there is no judgment of non-suit, a judgment being properly entered in bar.

The ruling of the court upon the demurrers to the replications to the eighth plea are immaterial, if the demurrers to either the fourth or fifth plea were properly overruled. Either of these pleas being good, the judgment must be affirmed. And the statute of Illinois provides that where judgment is given on demurrer, the successful party shall recover costs and have execution therefor.

All of which is respectfully submitted.

CHARLES H. LAWRENCE,
Counsel for Defd't. in Error.

SUPREME COURT U. S.
FILED.
APR 20 1891
JAMES H. McKENNEY,
CLERK.

IN THE

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OCTOBER TERM, A. D. 1890.

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HENRY J. ROGERS, PLAINTIFF IN ERROR,

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WM. F. DURANT, IMPLEADED, &C., DEFENDANT IN ERROR.

SUPPLEMENTAL ARGUMENT FOR DEFENDANT IN ERROR.

AS TO THE FIFTH PLEA.

CHARLES H. LAWRENCE,
Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

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SUPPLEMENTAL ARGUMENT FOR DEFENDANT IN ERROR.

AS TO THE FIFTH PLEA.

When I filed the fifth plea, setting up the fact that the causes of action arose without the State of Illinois and claiming five years as a limitation, I believed the plea good. The circuit judge was of the same opinion, and when I obtained leave of this honorable Court to file a supplemental argument it was for the purpose of showing, among other things, that the statute relied on had not been repealed, as claimed by plaintiff in error. In the first place, the act of February 10, 1849, in the same section describes a class of causes of action arising outside the State and the same kind of causes of action

arising within the State, as a separate class. Domestic causes of action are spoken of without any limiting adjective, doubtless because a legislature would be presumed to legislate only as to matters within its own sovereignty; but matters of foreign origin are specially described. Then, in the act of November 5, 1849, there is a repealing clause which is limited to such portions only of former acts as are inconsistent with the latter; and the latter makes no provision in regard to causes of action of foreign origin, which the existing law recognized as a separate class. The word "all," found in the act of November 5, is also found in that of February 10, and yet does not embrace matters arising outside the State. Therefore the act of November 5 is no more inconsistent with the five-year limitation as to foreign contracts found in the act of February 10 than it would be if the act of November 5 were inserted in the act of February 10 in lieu of that portion of the section which prescribes the limitation as to "all actions," &c., which are not described as arising beyond the limits of the State; hence, because this provision as to foreign causes of action is not inconsistent with the act of November 5 and as the repealing effect is expressly limited to matters inconsistent with it, and repeals by implication are not favored, it would seem that the limitation of five years as to foreign causes of action would stand.

Furthermore, in Baker, adm'r, *vs.* Browne (18 Ill., 91), which was a suit brought about the year 1856 on a foreign judgment, recovered prior to 1849, and wherein five years was pleaded as a bar under the act of February 10, 1849, and the sufficiency of the plea was treated as the main question in the case, the plea was held good. The Supreme

Court in their opinion, after quoting the statute, say: "The "law is revived and declared operative from its passage "by the limitation law of 1851 (Statutes of Ill., 1856, pp. "730, 731), so far as relates to the foundation of this action, "there being no law prior to the act of 1849 barring actions "on foreign judgments."

There was a law prior to 1849 barring actions on domestic judgments and fixing the limitation at twenty years. (Rev. Stat., 1845, chap. 66, § 5.) There was not, prior to 1849, any act barring actions on bills of exchange, either domestic or foreign, except "such as concern the trade of merchandise between merchant and merchant, their factors or agents." Thus the supreme court of the State holds that the language of the act of November 5, prescribing sixteen years as the limitation on "all actions founded on any judgment," does not repeal the provision of the act of February 10, fixing the period of five years as a bar to foreign judgments.

In the revision of the statutes of Illinois adopted in 1874 we find the period of limitation on foreign judgments fixed at five years, and at twenty years on domestic judgments. (Bemis *vs.* Stanley, 93 Ill., 230.) This was the argument, which seemed good to me, that I desired to add to my original brief in answer to the position of counsel for plaintiff in error that the provision of the act of February 10 as to foreign causes of action was repealed by the act of November 5, 1849, and in support of which he does not cite any case.

But, however professional zeal might tempt me to leave the argument of this question here, professional as well as personal honor seems to require me to cite the case of Ballenger *vs.* McKee (36 Ill., 225), which I have first seen only since the indulgence of further argument was accorded me,

in which it is held that notes made outside the State of Illinois after November 5, 1849, are barred only by the efflux of sixteen years, and that the act of 1851 did not repeal the act of November 5, 1849, or affect it in any way as to causes of action arising after its passage. I am unable to differentiate the principle of this case as applied to bills of exchange from the rule it establishes as to promissory notes, and am forced to conclude that under it the fifth plea is bad.

II.

AS TO THE FOURTH PLEA.

This plea, which is to the entire declaration and to "each of the counts thereof," avers that each and all of the supposed causes of action mentioned in the declaration "and each of the several counts thereof" are founded upon bills of exchange and sets up the bar of five years' limitation. To this plea a general demurrer was filed (P. R., p. 20), which was overruled; and, plaintiff in error electing to abide his demurrer, judgment went for defendant upon the plea. (P. R., p. 45.)

Counsel for plaintiff in error claims the ruling on the demurrer was erroneous, and in support thereof presents the first four propositions of his argument.

His first position is that a plea must fully answer all that it professes to answer, and that while the plea is good as to what he admits to be bills of exchange, yet because it is *in solido* to the whole declaration it does not answer the two counts on the bankers' checks, because, he says, checks are not bills of exchange. Passing for the present the last

premise, it is not denied, and there can be no question, that five years is a bar upon a bill of exchange.

Simon *vs.* Butters, 48 Ill., 226.

In order to avoid prolixity by repeating the same plea as to each of the twenty pieces of paper sued on, the form of plea adopted is both joint and several (P. R., p. 11), and is framed as a plea not only to the whole declaration, but to each of the counts severally. Unless this form be bad, the plea is good as to each of eighteen counts, presenting the same defense to each, and bad, according to opposing counsel, as to the two counts on two checks (Nos. 3 and 4) for the respective amounts of $388.45 and $99.35. Without stopping to discuss whether the demurrer should have been special or whether the sums sued for in those two counts would suffice to give this Court appellate jurisdiction, I pass to the immateriality of the distinction claimed to exist between checks and bills of exchange.

Counsel's position is that bankers' checks are not bills of exchange, citing Merchants' Bank *vs.* State Bank, 10 Wall., 647, and *In re* Brown, 2 Story, 502, and that because Federal courts are not bound by the decisions of a State court, where a question of general commercial law arises, these bankers' checks are to be classed under the Illinois limitation law as "other evidence of indebtedness in writing," instead of as bills of exchange, and as therefore barred only by the efflux of sixteen years instead of five.

I have no disposition to combat anything that is said in either of the cases cited by counsel for plaintiff in error. It is said in them that differences exist between checks and bills of exchange, the differences, which are pointed out, being chiefly that checks are always drawn on a banker

and are not entitled to days of grace, and others mentioned by Story, relating to liability of the different parties and questions as to principal and surety. Both cases agree that there are many properties identical to both. I concur in the statement that this Court is not bound by the decisions of a State court, where a question of general commercial law arises.

Daniell on Neg. Inst., II, p. 583, says: "A check is a draft "or order upon a bank or banking-house purporting to be "drawn upon a deposit of funds for the payment at all "events of a certain sum of money to a person or his order "or to bearer, and payable instantly on demand."

Parsons on Notes and Bills, II, 57, p. says: "A check is a "brief draft or order upon a bank or banking-house direct-"ing it to pay a certain sum of money." If a draft and a bill of exchange are the same in common parlance and a check is a draft it is not a strained construction of the Illinois act to hold "checks" included within the terms "bills of exchange."

But here is no question of commercial law. It is merely a question of definition of a term employed in a statute and the ascertainment of what was meant to be included in it. This Court is under no obligation to call a calf's tail a leg simply because a State court does so; but when the law of a State is that a calf's tail is a leg and the Legislature passes an act prescribing the length of calves' legs, the tail must be intended within the purview of the act; and where, as in Illinois, the law is that a check is a bill of exchange, as is conceded, and the Legislature prescribes the period of time within which an action must be brought in the Illinois courts on a bill of exchange by any party for any purpose,

it must be held that the term "bill of exchange" includes checks.

It is not doubted that the Legislature of Illinois has the right to fix the period during which her courts shall be open to holders of bills of exchange and of checks, and that the Federal courts will observe such limitations. It makes no difference what term the Legislature employs in describing the cause of action as to which it proposes to limit the remedy *as to time*, provided such term has a legal meaning within that State, or provided the intent is manifest, in view of the language employed in other acts or by the court of last resort. The question is not, Will this Court give the same relief in view of its decisions as would the State court in view of the decisions of its local tribunal? but instead it is, Are the courts open to any one—drawer, drawee, payee, remote or first indorser, after or in the absence of protest, whether before or after days of grace—for any relief whatever, after the lapse of five years from the time that liability accrues? Finally and conclusively, though differences between checks and bills of exchange exist, as found in 11 Wallace and 2 Story, cited for plaintiff in error, and in the works of Daniell and Parsons, as I have noted, it is still true that, for purposes of pleading, a check may be described as a bill of exchange. Such is the authority of *In re* Brown, 2 Story, where Justice Story says, on page 512, between the two excerpts given by counsel for plaintiff in error: "That it may "be declared upon as a bill of exchange is no proof that it "may not also be declared on as a check."

Parsons on Notes and Bills, II, p. 84 (2nd ed.), says that the bearer "may sue upon a check as upon an inland bill "of exchange," and cites several authorities in support of the rule. I have not found any which oppose it.

Of course, a description of a check as a bill of exchange which is good in a declaration is good in a plea; consequently the fourth plea, which is not alleged to have any special defect, is good, and a bar to the entire action and judgment was properly rendered upon it, no matter whether the rulings as to the fifth plea or the second and third replications to the eighth plea were erroneous or not. (Stephens on Pleading, 273.) If the other rulings constitute error it was *damnum absque injuria.*

III.

THE SECOND REPLICATION TO THE EIGHTH PLEA IS BAD, BECAUSE PAROL PROOF CAN BE RESORTED TO ONLY TO SHOW THAT WHICH ACTUALLY OCCURRED, BUT YET DOES NOT AFFIRMATIVELY APPEAR ON THE FACE OF THE RECORD; IT IS NOT ADMISSIBLE TO PROVE THAT WHAT APPEARS ON THE FACE OF THE RECORD TO HAVE OCCURRED DID NOT OCCUR, OR TO PROVE A NEGATIVE FACT IN REGARD TO IT.

It is familiar that an immaterial averment of a plea does not render the plea bad; likewise that such averment is not traversable. It is also a familiar rule that no matter of defense which merely denies what the plaintiff must prove should be pleaded specially.

Puterbaugh's III Common Law Pr., edition 1888, page 171.

If, then, the averments of the eighth plea, which are traversed by the second replication, are immaterial, no issue can properly be made on such averments, and a replication seeking to do so would be bad on demurrer.

If the averments are material it must be because they form an essential part of the record, the existence of which is stated by the plea, and therefore the general issue of *nul tiel record* would be the proper traverse, instead of a special replication, and such replication would be bad on demurrer, as the circuit court held.

If counsel for plaintiff in error chose to rely upon the principle of the case of Tams *vs.* Lewis, 42 Pa. St., 411, cited in his argument on page 20, to the effect that the only issue to which Rogers was a party or privy in the New York case was a mere collateral or incidental matter, which did not render it a part of the cause, so as to become *res adjudicata* by virtue of the decree in that proceeding, all he would have to do would be to rely upon the record, because unless the record shows affirmatively that it was a proper matter of adjudication, and likewise that it was binding upon Rogers, then the plea is not sustained by the proof. The plea makes profert of the record of the court as showing all the matters relied upon to constitute a defense. It does not aver that part of them are of record and part are not. Wherefore a traverse of any particular and material allegation of the plea can only be determined by inspection of the record; hence no other issue could be raised on the plea to determine the legal status of the parties to the proceeding than *nul tiel record.*

It is true that any matter in discharge, or, rather,—under the cardinal division of pleas into those by way of denial and those by way of confession and avoidance,—any matter by way of confession and avoidance may be pleaded specially, as was done in the third replication to the plea, which sets up that although Durant was not a partner in point of law

of James W. Davis and Associates, he had yet so held himself out to the plaintiff as to estop him from denying his liability as a partner. This replication the circuit court held good, because it neither contradicts nor varies the record.

In view of the argument of counsel in error upon this point, it may be well to call the attention of the Court to other cases than that of Newcomb *vs.* St. Peter's Church, 2 Sandf. Ch., 636, already cited.

In Bates *vs.* Stanton, 1 Duer, 87, it is said:

"It is a mistake to suppose that the term 'parties,' in the "sense of the rule which renders a prior judgment conclusive "upon those who sustain that character, is restricted to those "who are parties upon the record. On the contrary, it in- "cludes all who have a direct interest in the subject-matter "of the suit, a right to make a defense or control proceed- "ings."

To the same effect are—

Morgan *vs.* Thorne, 9 Dowling's Pr. Rep., 228.
Burrill *vs.* West, 2 N. H., 192.
Blasdale *vs.* Babcock, 1 Johnson, 517.
Duchess of Kingston's Case, 11 Harg. St. Tr., 243.

So in the English case of Collier *vs.* Walters, Law Reports, vol. 17, page 252, a person was improperly impleaded, and instead of moving his dismissal he remained in the case to a decree and took his costs. Afterwards, coming to an interest in the property, he filed a bill, but was held concluded by the decree.

In Benjamin *vs.* Elmira R. R. Co., 49 Barb., 441, a decree of foreclosure was held to conclude parties impleaded as judgment creditors when they were in fact mortgagees.

But the plaintiff in error seems to claim that in order to constitute an adjudication the matter in dispute must have been put in issue by the pleadings in the first suit. That has been stated as a general rule, but it is also true that there are exceptions; and in Babcock *vs.* Camp, 12 Ohio St., 12, the rule thus generally stated, it is said, "has no proper "application when the first suit was in chancery involving "the taking of an account between numerous parties occu- "pying various relations to each other and the adjustment "of many and complicated claims between them, and in "which many of the claims of the parties respectively must "of necessity be made and contested orally before the mas- "ter and on argument on exceptions to his conclusions; "and when it is apparent from the whole record of the first "suit that the matter in dispute in the subsequent suit might "have been contested and must have been passed upon by "the court in the first, the parties are concluded by the "former adjudication."

So in the New York case of Demorest *vs.* Darg, 32 N. Y., 281, it is held (referring to the conclusive character of a judgment on a point once litigated, &c.) "that there is no "difference in the application of the rule, whether the first "adjudication is in a formal action or in proceedings sum- "mary in their character." To the like effect is Supervisors, &c., of Onondaga *vs.* Briggs, 2 Denio, 26. Not only is this the case as respects matters specifically litigated and determined, but also as to all other matters fairly involved in the issues arising upon the same question, although the subject-

matter of the second controversy or grounds on which the second adjudication is sought may be different.

Bouchaud *vs.* Dias, 3 Denio, 238.
Gardner *vs.* Buckbee, 3 Cowen, 121.
Birckhead *vs.* Brown, 5 Sandf. Sup. C't Rep., 134.
Bangs *vs.* Strong, 4 N. Y., 315.
White *vs.* Coatsworth, 6 N. Y., 137.
Castle *vs.* Noyes, 14 N. Y., 329.
Dwight *vs.* St. John, 25 N. Y., 203.

Counsel for plaintiff in error (page 17) says that it is not disputed that a judgment was rendered at the time and by the court specified in the eighth plea, which judgment contains the language quoted and is in full effect; but he urges in support of the replication that the plaintiff in error was a party to that proceeding only *sub modo*, coming into said cause under an order permitting proof of the ownership and validity and amount of his claim, and nothing else.

The order referred to constitutes a part of the record and is expressly alleged in the plea (P. R., 14), so that this claim is not new matter to be set up by special replication, since it is already averred in the plea. He also claims that Rogers was in the case only for the purpose of proving ownership, validity, and amount of his claim, and admits that to that extent it is a binding adjudication upon him.

Counsel for plaintiff in error is driven to the position stated as the ninth proposition of his argument in the following language:

"It is only matters involved in the issues made by the "pleadings that are considered *res adjudicata*, and parol evi-"dence is competent to show that a question which it ap-

"pears by the record might have been litigated was not in "fact litigated in the former suit."

In other words, he claims the right to disprove the record by parol. On the contrary, I insist that neither of these things can be done, and that while it is true that what actually took place and yet does not affirmatively appear by the record, if necessary to establish the identity of the subject-matter or the grounds on which the judgment proceeded and show what matters were or were not actually considered and presented, may be shown by parol, yet that in a plea of former adjudication what does appear by the record must be proved by it, and is proved by it, and that a judgment is not only conclusive as to all matters which upon its face appear to have been actually determined respecting such demand, but as to other matters which might have been brought forward and determined respecting it.

Sturtevant *vs.* Randall, 53 Me., 154.
Chase *vs.* Walker, 26 Me., 558.
Walker *vs.* Chase, 53 Me., 262.
Burden *vs.* Shannon, 14 Gray, 433.
Babcock *vs.* Camp, 12 Ohio St., 36.
Cromwell *vs.* County of Sac, 94 U. S., 352.
Davis *vs.* Brown, 94 U. S., 428.

Hence if the record shows affirmatively matters which would conclude Rogers he can neither prove nor plead the contrary, or, in other words, such a special traverse of a plea of the record is bad. If any further authority were necessary the following quotation from counsel's brief is sufficient:

"When the declaration states a special matter as the

"ground of action and issue is taken by the defendant upon "the allegation, parol proof is inadmissible to show that a "different subject was litigated upon the trial."

Campbell *vs.* Butts, 3 Comst., 173.

A special replication denying the averment of the plea that after the rendition of the judgment in the New York case Rogers had availed himself of the decree and under it taken a dividend would be good, because that is a matter which would in no manner be shown by the record and is a matter subsequent to the decree; but it is admitted by the pleadings that he did take such dividend. Then if, in dividing the assets in the hands of the receiver in the New York case into two funds for the purpose of setting one of them apart for the creditors of Davis, Sprague & Co., of which Durant claimed and was found to be a member, and the other for the creditors of Jas. W. Davis and Associates, of which Durant denied he was a member and of which he was adjudged not to be a member, it was necessary to ascertain who composed the two firms and to ascertain that any distributee had a valid claim against the proprietors of either fund, it certainly was adjudged that these claims sued on were claims against and debts of the individuals who were doing business by the style of Jas. W. Davis and Associates, and of none others. This being so, the question of Durant's being a legal partner of the firm of Jas. W. Davis and Associates was in issue. The question was not only expressly raised upon the pleadings before Rogers came in, but was also necessarily involved in the proof of his claims. It was found Durant was not a partner. Certain moneys found to belong to that firm were directed to be distributed among its creditors, and Rogers

came in and took his share. This, under the cases cited, and especially the case of Newcomb *vs.* St. Peter's Church, from the opinion in which I quoted in my first argument, would seem to constitute a conclusive estoppel upon Rogers pressing the claim that Durant was in point of law a member of Jas. W. Davis and Associates. Therefore the second replication, which does not seek to supply matters which are not averred to appear in the record, but to deny those which are alleged to appear in the record, amounts merely to a plea of *nul tiel record*, or else it seeks to vary or contradict the record, and in either case is obnoxious to the demurrer filed to it, which was both general and special.

All of which is respectfully submitted.

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